Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

EBEN ALEXANDER III, M.D.,
Petitioner,

v.

BRIGHAM AND WOMEN'S PHYSICIANS ORGANIZATION, INC., et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Petition raises the unsettled and important question of what are the essential elements of a deferred compensation plan to qualify for "top hat" exemption under ERISA. "Top hat" plans are exempt from the protections afforded employee retirement funds under ERISA, including those protections relating to participation, vesting, funding, and fiduciary requirements. To qualify for "top hat" exemption, a plan must be "maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees." *See* 29 U.S.C. §1051(2), § 1081(a)(3), and §1101(a)(1) (emphasis added).

Rooted in ERISA's purpose to afford protection to employee pension funds and the Department of Labor's interpretation of the top hat exemption, the Sixth Circuit and a long line of federal cases have held that employees covered by top hat plans must have the ability to bargain with their employer over the terms of the plans. In conflict with the Sixth Circuit and the existing body of top hat law, the First Circuit has now held in the case at bar that bargaining power is not a requirement for a valid top hat plan. The First Circuit's decision below also conflicts with the Second and Sixth Circuits with regard to which employees should be included in the "select group" analysis. Thus, the questions presented by this petition are:

1. Whether a group of employees that lack the ability to influence the terms, operation and conditions of a plan and thereby protect their interests through

bargaining constitutes a "select group" for purposes of satisfying the "top hat" exemption under ERISA?

2. Whether the "select group" for purposes of analyzing the validity of a top hat plan is measured by all employees to whom the plan is offered, rather than by only those employees who actually contribute to the plans?

LIST OF PARTIES

Petitioner is Eben Alexander, III, M.D. Respondents are Brigham and Women's Physicians Organization, Inc., Boston Neurosurgical Foundation, Inc., Brigham Surgical Group Foundation, Inc. Deferred Compensation Plan, Brigham Surgical Group Foundation, Inc. Faculty Retirement Benefit Plan, Committee on Compensation of the Brigham Surgical Group Foundation, Inc., and Peter Black, M.D.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at *Alexander v. Brigham and Women's Physicians Organization, Inc.*, 513 F.3d 37 (1st Cir. 2008). The First Circuit affirmed the December 26, 2006 decision of the United States District Court for the District of Massachusetts reported at 467 F. Supp.2d 136 (D. Mass. 2006). *See Appendices A and B.*

STATEMENT OF JURISDICTION

The First Circuit entered judgment on January 23, 2008. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The "top hat" exemption appears in three sections of ERISA at 29 U.S.C. §1051(2), § 1081(a)(3), and §1101(a)(1). Those provisions state in relevant part as follows:

29 U.S.C. § 1051(2)

"This part shall apply to any employee benefit plan described in section 1003(a) of this title (and not exempted under section 1003(b) of this title) other than--...(2) a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees."

29 U.S.C. § 1081(a)(3)

"This part shall apply to any employee pension benefit plan described in section 1003(a) of this title, (and not exempted under section 1003(b) of this title), other than--...; (3) a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees..."

29 U.S.C. §1101(a)(1)

"This part shall apply to any employee benefit plan described in section 1003(a) of this title (and not exempted under section 1003(b) of this title), other than--(1) a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees;..."

STATEMENT OF THE CASE

Plaintiff/Petitioner Dr. Eben Alexander filed this action in April 2001 challenging the actions of his former employer, defendant Brigham and Women's Physician's Organization, Inc., successor to the Brigham Surgical Group Foundation, Inc. (together, "BSG"), who seized $441,000 in pension funds that Dr. Alexander had earned and accrued in two separate deferred compensation plans.[1] BSG reclaimed these

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[1] Dr. Eben Alexander invoked 29 U.S.C. § 1132(e)(1) and 28 U.S.C. § 1331 as the grounds for jurisdiction in the district court to assert his ERISA claims.

funds, which otherwise would have been vested under ERISA, pursuant to a forfeiture provision in the deferred compensation plans which the BSG claimed were valid top hat plans.

There is no Congressional legislative history elucidating the purpose of the top hat exemption, nor has this Court spoken on the issue. The most authoritative guidance for the past thirty-five years has been the Department of Labor, which has explained by way of an agency opinion that the rationale underlying the top hat exemption is that employees covered by such plans have the ability to influence their employer and do not require the usual protections afforded by ERISA. *See* Department of Labor Opinion Letter No. 90-14A ("DOL Op. No. 90-14A"). (*See Appendix C*).

In this case, however, it is undisputed that (i) Dr. Alexander lacked any power on his own to bargain, negotiate, or influence BSG with respect to the terms of these retirement plans (including the forfeiture provision); and (ii) Dr. Alexander was subject to the plans as a condition of his employment. Therefore, Dr. Alexander argued that the BSG plans were not valid top hat plans because the employees covered by these plans lacked bargaining power and also because the plans were not intended for a "select group." Without the benefit of the top hat exemption, BSG had no right to seize these funds because Dr. Alexander's monies in the plans would have vested pursuant to ERISA's vesting provision. 29 U.S.C. §1053. Accordingly, the principal question for review is what are the specific criteria to establish a deferred compensation plan that

is exempted from the ERISA provisions that protect employees against benefit forfeitures.

I. Factual Background

A. The Plans and Their Definition of "Participant"

The essential facts are undisputed. BSG hired Dr. Alexander as a neurosurgeon in 1988. (*App. 3a*). BSG was a non-profit, tax-exempt corporation organized to carry out the purposes of Harvard Medical School. (*App. 56a*). BSG's function was to teach surgery, train residents, and conduct the Department of Surgery at the Brigham and Women's Hospital. (*Id.*). Like all BSG surgeons, Dr. Alexander's compensation was determined in accordance with BSG's Professional Staff Compensation Policy ("Compensation Policy"). (*Appendix F*). The stated objective of the BSG Compensation Policy was "[t]o provide a system of compensation that will enable the acquisition and retention of a professional staff of national and international stature and assure a balanced program of care, teaching and research." (*App. 75a*). Compensation paid to members of BSG's professional staff was subject to a salary cap set forth in the Harvard System of Titles, Appointments and Compensation Arrangements for the Faculty of Medicine of Harvard University. (*Id.*). Each year, surgeons were assessed a practice surplus or deficit, depending upon whether a surgeon's net practice income (total income less expenses) or "NPI" exceeded a surgeon's salary for that particular year. (*App. 85a-86a*).

Integral to BSG's compensation scheme were two unfunded deferred compensation plans for all of its surgeons: the Unfunded Deferred Compensation Plan ("UDC") and the Faculty Retirement Benefit Plan ("FRBP") (together, the "BSG plans"). (*Appendices D and E*). Participation in the BSG plans was mandatory and all BSG surgeons were required to contribute to the UDC and FRBP pursuant to the Compensation Policy if a surgeon's net practice income exceeded the Harvard salary cap. (*App. 6a; 79a-80a*). Surgeons with a practice surplus would receive contributions equal to 25% of their total salary in their FRBP account first, and then receive contributions equal to 50% of their remaining surplus in their UDC account. (*App. 4a; 79a-80a*). The First Circuit recognized the mandatory nature of the plans: "As written, the plans afforded no option for any surgeon to opt out." *Alexander*, 513 F.3d at 41 (emphasis added) (*App. 6a*).

The First Circuit also noted that "the plans covered all full-time BSG surgeons who held Harvard faculty appointments." *Alexander*, 513 F.3d at 41 (*App. 6a*) (emphasis added). This was evident by the language of the plans. In particular, Section 1.2 of the UDC provided:

> The "Employees" are surgeons who are members of the full-time faculty of the Harvard Medical School and are employed by the Employer to perform and teach surgery in the clinical setting of the Brigham and Women's Hospital by collaborating with students and residents in the practice of surgery, in research, and in the development of theory. The

> Employees are paid by the Employer which (with few exceptions) is their only source of earned income and which is required to observe certain limitations imposed by the Harvard Medical School on total compensation which may be earned by members of its full-time faculty.

(*App. 56a-57a*).

Likewise, section 2.01 of the FRBP defined "Eligibility" as follows: "Participants hereunder shall all be employees of the Employer who are members of the full-time faculty of the Harvard Medical School.[2] (*App. 66a*).

For the years in question (1997-1999), the surgeons who at the beginning of the year were eligible to contribute to the UDC and FRBP ranged between 27.2% and 32.4% of BSG's total workforce. Notably, the First Circuit acknowledged that this large percentage would not constitute a "select group" under the statute. *Alexander*, 513 F.3d at 40-41 (*App. 5a, 12a*).

B. Dr. Alexander Lacked Bargaining Power

It was undisputed that although all surgeons were eligible to contribute to the plans, no individual

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[2] Unlike the UDC, the FRBP "provided that the Committee on Compensation of the Employer (the 'Committee') may limit participation in order to fulfill the intent set forth in Section 5.02." (*App.* 692 at § 2.01).

surgeon had the power to negotiate the terms of the plans. Indeed, both the district court and the First Circuit specifically recognized that Dr. Alexander lacked individual bargaining power. The district court stated:

> Alexander did not, however, have the opportunity or ability to decline to contribute to the FRBP or UDC if he earned enough to do so. Nor did he alone have the ability to negotiate modifications to either plan. Rather, if Alexander wanted to be a member of BSG and of the Harvard Medical School faculty, he had to accept the terms of those plans.

Alexander, 467 F. Supp.2d at 140 (*App. 30a*) (emphasis added). Similarly, the First Circuit acknowledged, "because they [the plans] were already in place when the appellant joined BSG, he had no real opportunity to bargain over their terms." *Alexander*, 513 F.3d at 41 (*App. 6a*).

II. The District Court's Findings and Conclusions

After a bench trial, the district court made three notable findings: (i) "[a]ll surgeons who were full-time faculty of the Harvard Medical School were eligible to contribute to the FRBP and the UDC"; (ii) the surgeons who could have earned enough to contribute to the UDC and FRBP constituted about 30% of BSG's total workforce; and (iii) Dr. Alexander had no "ability to negotiate modifications to either plan." *Alexander*, 467 F. Supp.2d at 140 (*App. 30a-32a*).

Despite these findings, the district court concluded that the UDC and FRBP were valid top hat plans. In the process, the district court disagreed with the Second Circuit and other district courts regarding the relevant pool of employees in measuring "select group" and whether bargaining power is an essential element of a valid top hat plan. *Compare Alexander*, 467 F. Supp.2d at 143 (*App. 38a*) ("in the circumstances of this case it is not appropriate to focus on all BSG surgeons to define the [select] group.") *with Demery v. Extebank Deferred Compensation Plan (B)*, 216 F.3d 283, 285 (2d Cir. 2000) (plan measured by percentage of total workforce to whom it was offered, not who actually contributed to plan); *compare Alexander*, 467 F. Supp.2d at 147 (*App. 47a*) ("[i]n essence, Alexander asks this court to follow the district court in [*Darden*] and apply the §1002(7) definition of participant for the purpose of determining whether the FRBP and UDC were maintained only for a select group. . . It is not, however, appropriate to do so.") *with Darden v. Nationwide Mut. Ins. Co.*, 717 F. Supp. 388, 396-97 (E.D.N.C. 1989) (employees who "may become eligible" for benefits must be included in defining the "select group") (emphasis in original) *aff'd*, 922 F.2d 203 (4th Cir. 1991), *rev'd on other grounds*, 503 U.S. 318 (1992).

In addition, the district court disagreed with the Sixth Circuit and other lower courts on the issue of bargaining power. *Compare Alexander*, 467 F. Supp.2d at 145 (*App. 43a*) ("[h]owever to the extent, if any, that other courts have interpreted §1051(2) to require a showing that an individual such as Alexander had actual, individual bargaining power sufficient to negotiate the terms of an unfunded deferred compensation plan, this court respectfully

disagrees.") *with Guiragoss v. Khoury*, 444 F. Supp.2d 649, 661 (E.D.Va. 2006) ("A third requirement [for a valid top hat plan], provided by DOL advisory opinions, is that the select group consist of individuals who are in the position to protect their own interests.").

III. The First Circuit Decision

The First Circuit adopted the district court's findings of fact and affirmed the district court's ruling that the plans were valid top hat plans. In so doing, the First Circuit's decision conflicts with the Sixth Circuit decision in *Bakri v. Venture Mfg. Co.*, 473 F.3d 677 (6th Cir. 2007)[3] and many district courts which have identified bargaining power as an essential element in the top hat analysis. The First Circuit stated:

> Insofar as these cases adumbrate a hard-and-fast requirement that individual top-hat plan beneficiaries must have bargaining power, they all ultimately derive that requirement from the DOL opinion letter.
>
> We decline the appellant's invitation to depart from the plain language of the statute and jerry-build onto it a requirement of individual bargaining power. The DOL opinion letter speaks only to Congress' rationale for enacting the top-hat provision. It does not present itself as an interpretation of the provision's

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[3] *Bakri* was decided after the district court issued its decision.

> requirements, nor does it make any mention of the need for or propriety of demanding that employers demonstrate their employees' ability to negotiate the terms of deferred compensation plans.

Alexander, 513 F.3d at 47 (*App.* 19*a*).

The First Circuit's decision also conflicts with the Second Circuit in determining which group of employees must be considered when measuring whether the group is "select." Affirming the district court, the First Circuit held that only those employees who actually contributed to the BSG plans should be included in the analysis:

> Thus, for the purpose of determining whether a plan services a select group, we find relevant here only those employees who actually earned enough NPI [net practice income] to fund plan contributions. They are the employees for whom the money in the plans is being managed and held; they are thus the employees whom Congress had in mind when it devised the contours of the top-hat carve-out.

Alexander, 513 F.3d at 44. (*App.* 13*a*). In stark contrast, the Second Circuit has held that the relevant group to include in order to measure "select group" is all employees to whom the plan is offered. *Demery*, 216 F.3d at 285, 289.

REASONS FOR GRANTING THE PETITION

The First Circuit's decision below creates conflicts and further ambiguity with two other circuits on two distinct issues relating to top hat plans: (i) whether bargaining power is a required element to establish a select group; and (ii) what is the appropriate pool of employees to include in the "select group" analysis. The criteria for determining whether a deferred compensation plan qualifies for the "top hat" exemption under ERISA is an important question affecting the rights of employees to their pension funds, including whether an employee's retirement funds are subject to forfeiture without the employee's ability to influence the retirement plan. Accordingly, this issue warrants this Court's guidance because ERISA's primary purpose is to protect employees' pension rights unless the plan falls within one of ERISA's limited exceptions.

The specific conflict at issue between the First and Sixth Circuits concerns whether employees who are covered by a top hat plan must have the ability to negotiate or bargain with their employer to be valid. The Sixth Circuit held that bargaining power is an aspect of the "selectivity" requirement of a top hat plan analysis, and relied upon ERISA's fundamental purpose and the rationale for the top hat exemption explained in DOL Op. No. 90-14A (*i.e.* that participants in the plan have the power to negotiate the terms of their deferred compensation plans with their employer). The First Circuit squarely held the opposite: that bargaining power is not part of the top hat analysis. Accordingly, review is warranted based on the conflict between the First and Sixth Circuits

regarding whether bargaining power is an essential element of a top hat plan. *See* Sup. Ct. R. 10(a). This issue also presents an important question of federal law that should be settled by this Court because of its wide-ranging effect on employee pension rights. *See* Sup. Ct. R. 10(c).

The second reason warranting review is that there is now a split between the First and Second Circuits regarding the relevant pool of employees to include when measuring whether those employees comprise a "select group," as required by the top hat provision. The First Circuit held below that only surgeons who actually contribute to the deferred compensation plans should be included for purposes of defining "select group." In contrast, the Second Circuit has held that all employees to whom the plan was offered is the relevant group to include quantitatively. The First Circuit's decision also contradicts prior lower court decisions -- cited by the Second Circuit -- recognizing that the statutory definition of "participant" includes employees who "may become eligible" for benefits, and therefore, all employees who may satisfy the eligibility criteria for contributions to the plans must be counted in determining whether the group is select. Accordingly, review by this Court is warranted to resolve the split between the First and Second Circuits regarding the employees who define the "select group" in a top hat analysis. *See* Sup. Ct. R. 10(a).

REVIEW IS WARRANTED TO DEFINE THE CRITERIA TO SATISFY THE TOP HAT EXEMPTION UNDER ERISA

I. The First Circuit Conflicts with the Sixth Circuit Regarding Whether Employees Subject to Top Hat Plans Must Have the Ability to Bargain with their Employer and Protect their Own Interests

The Sixth Circuit noted that an employee's ability to negotiate is part of the "selectivity" element of the top hat exemption. *See Bakri*, 473 F.3d at 680. In *Bakri*, the Sixth Circuit reversed summary judgment entered for the employer because the "selectivity" element of the top hat exception was missing where "the deferred compensation plan consisted of employees like [plaintiff], who had no supervisory, policy making, or executive responsibility, and had little ability to negotiate pension, pay or bonus compensation..." *Id.*

The Sixth Circuit's holding is derived from and supported by (i) the underlying purpose of ERISA; (ii) DOL Op. No. 90-14A; and (iii) a long line of federal cases interpreting the top hat provision. *See Alexander*, 513 F.3d at 47 (*App.* 19a), *citing Duggan v. Hobbs*, 99 F.3d 307, 312- 313 (9th Cir. 1996); *Guiragoss*, 444 F. Supp.2d at 658-59, 664; *Carrabba v. Randall Food Mkts., Inc.*, 38 F. Supp.2d 468, 477-78 (N.D. Tex. 1999); *Prior v. Innovative Communication Corp.*, 360 F. Supp. 2d 704, 713-714 (D.V.I. 2005).

First, the bargaining power requirement is rooted in ERISA's fundamental purpose and Congress'

overriding intent to protect employee retirement funds.[4] "ERISA is landmark legislation that subjects a wide variety of employee benefit plans to complex and far-reaching rules designed to protect the integrity of those plans and the expectations of their participants and beneficiaries." *Barrowclough v. Kidder, Peabody & Co., Inc.*, 752 F.2d 923, 929 (3d Cir. 1985) (discussing statutory framework of ERISA and top hat exception), *overruled on other grounds by Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110 (3d Cir. 1993). ERISA's coverage extends to all employee benefit plans unless a plan falls within an exception to ERISA. *Demery*, 216 F.3d at 286-87. "[A] plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees," is exempt under the top hat exception (internal quotations omitted). *Id.* at 287, citing 29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1). If valid, a top hat plan is exempt from ERISA's participation, vesting,

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[4] 29 U.S.C. § 1001 sets forth Congress' findings and policy declaration underlying the establishment of ERISA. The declaration plainly emphasizes the statute's aim to protect employees' pension rights (such as vesting) by stating, for example: "that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans...and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness."

funding, and fiduciary provisions. *Demery*, 216 F.3d at 287.[5] Otherwise, these usual protections apply.

Acknowledging the protections afforded employees under ERISA, "Congress and the Department of Labor have determined that management and highly compensated employees who participate in unfunded deferred compensation plans do not need the same level of protection" as other workers and are therefore exempted from certain of ERISA's requirements. *Barrowclough*, 752 F.2d at 934, *citing* Reporting and Disclosure Requirements, 40 Fed. Reg. p. 34,530 (August 15, 1975) ("The class of employees with respect to whom this alternative method of compliance applies – highly compensated or management employees – generally have ready access to information concerning their rights and obligations and do not need the protections afforded them by Part 1 of Title I of the Act.") (other citations omitted). *See Alexander*, 513 F.3d at 43 ("Presuming that employees of this [top hat] statute can fend for themselves, Congress relaxed some of ERISA's prophylactic obligations."). Notably, however, bargaining power or ability to influence a plan is the only real mechanism for which an employee can fend for herself.

Recognizing the essence of ERISA's purpose, the Department of Labor, in light of the lack of detailed

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[5] When analyzing whether a plan satisfies the top hat exception, "it is important to note that ERISA is a remedial statute that should be liberally construed in favor of employee benefit fund participants. To that end, exemptions from ... ERISA coverage should be confined to their narrow purpose." *Guiragoss*, 444 F. Supp.2d at 659 (internal quotations and citations omitted).

legislative history, expressed its view that the top hat exemption can only apply to those employees who may influence a deferred compensation plan so as to avoid being taken advantage of by employers as had historically occurred prior to the enactment of ERISA:

> It is the view of the Department that in providing relief for "top-hat" plans from the broad remedial provisions of ERISA, Congress recognized that certain individuals, by virtue of their position or compensation level, have the ability to affect or substantially influence, through negotiation or otherwise, the design and operation of their deferred compensation plan, taking into consideration any risks attendant thereto, and, therefore, would not need the substantive rights and protections of Title I.

DOL Op. No. 90-14A.[6] (*App. 52a*). With approbation since the Department of Labor's 1990 pronouncement, courts have routinely relied on this practical and important interpretation in developing top hat jurisprudence. *See e.g.*, *Bakri*, 473 F.3d at 678; *In re*

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[6] The DOL is responsible for administering Title I of ERISA, but has published no regulations on top hat plans since ERISA's enactment in 1974. Michael Sirkin and Lawrence K. Cagney, Executive Compensation, §7.03[2] (2002). The First Circuit acknowledged that several courts have relied upon DOL Op. No. 90-14A as a basis for the "requirement that individual top-hat plan beneficiaries must have bargaining power." *Alexander*, 513 F.3d at 47 (*App. 19a*). Nevertheless, the First Circuit concluded that the statute does not require "proof of [bargaining] power of any sort." *Id.* at 48 (*App. 22a*).

IT Group, Inc., 448 F.3d 661, 665 N.1 (3d Cir. 2006); *Duggan*, 99 F.3d at 310; *Gallione v. Flaherty*, 70 F.3d 724, 729 (2d Cir. 1995); *Guiragoss*, 444 F. Supp.2d at 659; *Carrabba*, 38 F.Supp.2d at 477; *In re Silicon Graphics, Inc.*, 363 B.R. 690, 697 (S.D.N.Y. 2007); *Hollingshead v. Burford Equip. Co.*, 747 F. Supp. 1421, at 1429-1430 (M.D. Ala. 1990); *In re Battram*, 214 B.R. 621, 624-625 (C.D. Cal. 1997); *Fuqua v. Tarmac of America, Inc.*, 228 F. Supp.2d 755, 763 (E.D.Va. 2002); *Kemmerer v. ICI Americas, Inc.*, 842 F. Supp. 138, 144 (E.D. Pa. 1994).

Notably, in 2006, the *Guiragoss* court made *explicit* that an employee's bargaining power with respect to negotiating the terms of the plan was a "third requirement" for a valid top hat plan and thus a necessary factor in the "select group" analysis. As the *Guiragoss* court held:

> A *third requirement*, provided by *DOL advisory opinions*, is that the select group consist of individuals who are *in the position to protect their own interests*. This requirement helps ensure that ERISA's underlying objectives of ERISA are not undermined by the plan's exemption from specific ERISA requirements. Top hat plans were conceived as a way to free deferred compensation agreements for certain executives from the burden of ERISA regulation. The assumption underlying the top hat exemption from ERISA is simply that top-level executives are in a favorable bargaining position to negotiate the terms of an agreement and, therefore, do not need a comprehensive

> regulatory scheme, like ERISA, to protect their interests.

Guiragoss, 444 F. Supp.2d at 661 (emphasis added).

In 2007, the Sixth Circuit, in accord with *Guiragoss*, treated bargaining power as an element of the statute's "selectivity" requirement. *Bakri*, 473 F.3d at 680. Thus, the Sixth Circuit interpreted the "select group" language in the statute to encompass the rationale expressed by the DOL that participants in top hat plans have the ability to bargain with their employers concerning the design and operation of the plan.

The First Circuit's decision directly conflicts with the Sixth Circuit's decision in *Bakri* and its fundamental building blocks - - the DOL Opinion letter and evolving top hat law - - by holding that bargaining power is *not* part of the criteria to determine whether a plan qualifies for top hat status. *See Alexander*, 513 F.3d at 47 (*App. 19a*). In contrast to the Sixth Circuit's ruling, the First Circuit stated:

> [R]elying on that [DOL] letter to justify a nascent requirement that every employee covered by a top-hat plan possess the power to negotiate the terms of that plan is simply too much of a stretch. To our way of thinking, such a reading is both unwarranted and unpersuasive. Even without the additional requirement of individual bargaining power, Congress's enactment strikes us as a reasonable effectuation of its purpose. In any event, in limiting the top-hat provision to a "select group

> of management or highly compensated employees," Congress ensured that employees' interests would be sufficiently protected.
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> Although Congress' rationale for fashioning the exemption was that members of a "select group of management or highly compensated employees" could fend for themselves, the statute, by its terms, does not purport to require proof of power of any sort. In such circumstances, it would be highly unorthodox to convert a rationale (like the one set forth in the DOL opinion letter) into an independent statutory test.

Alexander, 513 F.3d at 47-28 (*App. 20a, 22a*).

Discounting the DOL Opinion and rejecting application of its rationale as "highly unorthodox" under *Skidmore* deference principles, the First Circuit summarily rejected the notion of bargaining power as an element of a valid top hat plan.[7] But, as this Court is well aware, where there is a lack of legislative

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[7] Other courts have taken the opposite approach. The *Guiragoss* court, for example, specifically noted that DOL Op. No. 90-14A is entitled to *Skidmore* deference and stated "that given the paucity of authority on top hat plans, other courts have also consulted the DOL advisory opinion letters for guidance." *Guiragoss*, 444 F. Supp.2d at 658-659 n. 11, *citing Gallione*, 70 F.3d at 729 (*citing* DOL opinion to explain Congress' intent when establishing top hat plan exemption); *Carrabba*, 38 F. Supp.2d at 479 (applying DOL opinion's top hat standard to evaluate plan).

history to evidence Congressional intent, an agency's policy statements may assist in interpreting the statute itself. *See e.g. Federal Express v. Holowecki*, -- U.S. --, 128 S. Ct. 1147, 1156 (2008). By way of further example, in *Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259, 1268 (11th Cir. 2008), the Eleventh Circuit reversed the trial court's ruling as to how "regular rate of pay" was to be calculated under the FLSA. Noting that the district court ignored the DOL's interpretive bulletin on the same issue and fashioned its own calculation, the Eleventh Circuit reversed based on *Skidmore* deference and adopted the method for calculating "regular rate of pay" set forth in the DOL's interpretive bulletin. *See also Connecticut Office of Protection and Advocacy For Persons With Disabilities v. Hartford Bd. of Educ.*, 464 F.3d 229, 239-240 (2d Cir. 2006) (upholding trial court's adoption of Department of Health and Human Services' interpretation of the word "facility" in the Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. §§ 10801-10851); *Bolen v. Dengel,* 340 F.3d 300, 310 (5th Cir. 2003) (affirming trial court's adoption of the Executive Office of the U.S. Trustee's Handbook "expense first" policy of calculating expenses and compensation for U.S. Trustees because 28 U.S.C. § 586(e) was silent on the issue).

The First Circuit's implicit rejection of ERISA's purpose, its failure to apply the rationale in the DOL Opinion based upon *Skidmore* deference, and its contravention of many years of top hat law warrant review. As discussed below, the conflict between the First and Sixth Circuits on whether bargaining power is a requirement for a valid top hat plan has far-reaching implications for employees and the

forfeitability of their pension funds. Indeed, in less than two months since the First Circuit issued its decision, one court already followed the First Circuit and rejected the argument that bargaining power is a requirement for a valid top hat plan. *See Fishman v. Zurich Am. Ins. Co.*, --- F. Supp.2d ---, Case No. 05-C5227, 2008 WL 719221, at *13 n.3 (N.D.Ill. 2008). Intervention by this Court is necessary to avoid further confusion and vastly differing results in the courts on this issue.

II. The Importance of Bargaining Power as a Requirement for a Valid Top Hat Plan

Aside from the conflict between the circuits on the bargaining power issue, this matter presents a serious question of general importance because it impacts employees' rights to their pension funds, and forfeitability of those funds in particular. Indeed, this case exemplifies the importance of ensuring that employees who are subject to top hat plans have a real ability to fend for themselves and influence their employers regarding their deferred compensation plans. The irony of the First Circuit's decision is that it is undisputed that Dr. Alexander lacked bargaining power to negotiate the terms of the UDC and FRBP, yet he was forced to participate in these plans and ultimately forfeited his retirement funds because he had no vesting protection. *See Alexander*, 513 F.3d at 41 (*App. 6a*) ("he had no real opportunity to bargain over their terms"). The structure of the BSG Compensation Policy and the BSG plans reinforce that there was no ability for Dr. Alexander to negotiate the terms of the plans. According to the Compensation Policy, the amount of annual take-home compensation

must conform to limits set by Harvard University, and therefore, there was no opportunity for surgeons to negotiate a different mix of take-home and deferred compensation. (*App. 3a-6a*). In addition, neither the UDC nor the FRBP provided employees with an opportunity to negotiate for adequate security of benefits or other protections. (*Appendices D and E*). As the First Circuit conceded, a surgeon who is offered a position on the Harvard Medical School faculty through the BSG must agree to deferred compensation into the UDC and FRBP upon realizing certain income levels. *Alexander,* 513 F.3d at 41 (*App. 6a*).

Indeed, the BSG compensation scheme is structured in a manner and includes terms to which no employee would accede unless participation was mandatory. Unlike virtually every other "unfunded" top hat plan, the contributions that Dr. Alexander made were subject to immediate taxation. (*App. 65a-66a; 80a*). *See In re IT Group, Inc.*, 448 F.3d at 664 (main purpose of deferred compensation plan is to defer taxes until retirement when employee is in lower tax bracket); *Kemmerer v. ICI Americas Inc.*, 70 F.3d 281, 286 (3d Cir. 1995) (top hat plans "largely exist as devices to defer taxes"). Despite this, the funds that Dr. Alexander contributed to the plans were subject to BSG creditors and could be offset by BSG to cover any debts that BSG claimed against Dr. Alexander. (*App. 59a, 68a, 70a*). The plan gave Dr. Alexander neither the security of a funded plan nor the tax benefits of a truly unfunded deferred compensation plan. No employee with any bargaining power would have readily agreed to this arrangement without the ability to negotiate downside protections.

The issue of whether bargaining power is a requirement for a valid top hat plan has implications reaching far beyond this case. If this Court does not settle the issue, then employers will be free to structure plans that allow for forfeiture of employee pension funds by employees who have no say in the matter – like in Dr. Alexander's case. This result undermines the purpose of ERISA generally, and the top hat exemption specifically. Namely, employees covered by such plans cannot fend for themselves, thereby eviscerating the protections contemplated by ERISA.[8]

In sum, the First Circuit's holding that bargaining power is not an essential step in the top hat analysis contradicts Congress' broad intent, the justification for top hat plans as explained by the DOL, and most

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[8] The First Circuit assumed without deciding that "collective bargaining power might conceivably be a prerequisite for a top-hat plan" but at the same time noted its "grave doubts about the correctness of this assumption." *Alexander*, 513 F.3d at 48 (*App. 21a*). Even if there existed real collective bargaining power at the BSG, which Dr. Alexander vigorously contested, the *Carrabba* court rejected the concept of collective bargaining power, stating:

> The evidence does not persuade the court that any significant number of the participants in the MSP individually had bargaining power of that kind. Of course, as a group, to the extent that they could act cohesively, they undoubtedly could influence the design and operation of the MSP, but that would be true of any group of employees within a company.

Carrabba, 38 F. Supp.2d at 478. The Sixth Circuit favorably cited this language from the *Carrabba* decision. *Bakri*, 473 F.3d at 679.

significantly for purposes of this Petition, the Sixth Circuit and a long history of top hat case law that has adopted the DOL's interpretation of the top hat provision.

III. The First Circuit Conflicts With the Second and Sixth Circuits Regarding the Relevant Employees to Include in the "Select Group" Analysis

The First Circuit's decision in *Alexander* creates yet a second conflict among the circuits regarding which employees are to be included in measuring the "select group" for purposes of a top hat analysis. The First Circuit held that only employees who actually contribute to the plans should be included in the analysis. This ruling conflicts specifically with the Second Circuit *Demery* decision and the Sixth Circuit *Bakri* decision which both measure "select group" based upon to whom the plan is offered or who is invited to join the plan.

As the evolution of top hat cases shows, the "select group" requirement under the top hat exemption, "must be met both quantitatively and qualitatively." *In re IT Group*, 305 B.R. at 410; *Demery*, 216 F.3d at 288. The Sixth Circuit explained the test as follows:

> In determining whether a plan qualifies as a top hat plan, we consider both qualitative and quantitative factors, including the percentage of the total workforce invited to join the plan (quantitative), (2) the nature of their employment duties (qualitative), (3) the compensation disparity between top hat plan

> members and non-members (qualitative), and (4) the actual language of the plan agreement (qualitative).

Bakri, 473 F.3d at 678, 680 (reversing and remanding summary judgment entered for employer because plan did not meet "the 'selectivity' requirements of §1051(2)") (emphasis added).

The qualitative factor is simply not at issue on this Petition. With respect to the quantitative component of "select group" analysis, the Second Circuit has set the bar at 15% so that a plan covering more than 15% of employees is likely not a valid top hat plan. *In re IT Group*, 305 B.R. at 410, *citing Demery*, 216 F.3d at 287 (holding deferred compensation plan offered to 15.34% of employees qualified for top hat status but noting "this number [15.34%] is probably at or near the upper limit of acceptable size for a 'select group'..."). *See also Darden*, 717 F. Supp. at 396-97 (finding that 18.7%, or one-fifth, of total workforce "too large to be considered 'select' for purposes of the top-hat exemption"). By definition, a plan that covers all management or all high level employees is not select and is therefore invalid. *See* Ridgeley A. Scott, Rabbis and Other Top Hats: The Great Escape, 43 Cath. U. L. Rev. 1, 9 (1993) ("An adequate group must be select, which means that a group cannot cover all management and highly compensated employees.").

The Second Circuit's *Demery* decision requires a brief explanation. In *Demery*, bank officers challenged the validity of the defendant bank's deferred compensation plans, arguing that because the plans were offered to more than 15.34% of the bank

employees, they were not offered to a "select group." *Demery*, 216 F.3d at 289. The Second Circuit measured the "select group" by the percentage of employees to whom the deferred compensation plan was offered (15.34%) as opposed to those who actually participated in the plan:

> The Plan was *offered* to assistant vice-presidents, managers, and other senior officers, representing approximately 15% of the workforce of Extebank. Approximately 7 to 10% of Extebank employees actually participated in the Plan, which allowed participants to defer up to 25% of their salary as contributions to the Plan.
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> ...Plan B was *offered* to 15.34% of Extebank employees... this number is probably at or near the upper limit of the acceptable size for a "select group," . . .

Demery, 216 F.3d at 285, 289 (emphasis added). Like *Demery*, the Sixth Circuit looked to the number of employees who were "invited to join the plan" in determining the select group. *Bakri*, 473 F.3d at 678.

The First Circuit decision directly conflicts with the Second and Sixth Circuits by counting only those surgeons who actually received contributions to the plans (*i.e.* those surgeons whose NPI exceeded the Harvard salary cap in a given year) to define the "select group." *Alexander*, 513 F.3d at 44 (*App. 12a*) ("Common sense suggests that it is this small fraction

[surgeons with a surplus] that should be taken into account in determining the composition of the select group for whom the plans were maintained."). Based on the conflict in the circuits, review by this Court is warranted to set the appropriate standard by which to measure a "select group" for purposes of the top hat analysis.

The measure used by the Second and Sixth Circuits to include all employees who *possibly* could contribute to the plans is more appropriate than the First Circuit's measure, which includes only those who *actually* contribute to the plans.[9] This is because the plans were "maintained" for all surgeons rather than just those who achieved a practice surplus. *See* 29 U.S.C. § 1051(2) (plan must be "maintained" for a "select group"). The proof is in the structure of the BSG compensation scheme. Indeed, the plans were used as a recruitment and retention tool to secure top doctors. (*App. 3a*). Once hired by BSG, *all* doctors were provided with information about the plans. (*App. 5a-6a*). And any doctor whose NPI exceeded the salary cap would be *required* to participate in the plans. (*App. 4a, 6a*). Thus, as the First Circuit conceded, all surgeons were potentially eligible to contribute to the plan in any given year. *Alexander*, 513 F.3d at 40-41 (*App. 4a-5a*).

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[9] The First Circuit noted that the percentage of the workforce who was covered by the plans (approximately 30%) is hardly "select." *Alexander*, 513 F.3d at 44 (*App. 11a-12a*). That high percentage, moreover, far exceeds the 15.34% ceiling established by the Second Circuit in *Demery*. 216 F.3d at 287-288.

The fact that all surgeons not only could, but were required, to contribute to the plans if they exceeded the Harvard salary cap further supports that the BSG plans were not "maintained" for a "select group." Said differently, the fact that participation in the plans was mandatory versus optional as in *Demery* underscores that the plans were not maintained for a select group. Rather, the plans were offered to all surgeons from the inception of their employment and were "maintained" for all surgeons as part of BSG's compensation scheme. The undisputed facts that (i) each doctor received information about the plans at the start of his or her employment, (ii) the plans were incorporated into BSG's Compensation Policy that governed all doctors, (iii) the plans were used as recruitment and retention tools by the BSG, and (iv) no doctor had a choice about contributing to the plans, demonstrate that the plans were offered to all surgeons and "maintained" for all of them in the event their net practice income exceeded the Harvard salary cap.

The First Circuit's attempt to distinguish *Demery* actually highlights that the BSG plans were "maintained" for all surgeons. *Alexander*, 513 F.3d at 44 (*App. 13a*) ("This conclusion is not at odds with the case law."). The First Circuit pointed out that in *Demery, Guiragoss,* and *Carabba*, the ability to fund the plan always existed because it was based on every member receiving some benefit (like a commission) or the plan was funded as a matter of discretion. *Id.* In this case, however, the mandatory nature of the compensation scheme required all surgeons to contribute to the plans if their salary exceeded the Harvard cap. This mandated participation for all surgeons undercuts that the plans were maintained for

only a smaller subset who received contributions into the plans. In fact, no one knew at the start of each year who would exceed the salary cap, and therefore, the plans had to be "maintained" for anyone and everyone who did.

The *Demery* test also protects against a plan morphing in and out of top hat status year to year – an inherent risk if the measure is who actually contributes to the plans as opposed to all employees who are covered by the plans. Administering such morphing plans would be impossible because some years the plans would be exempt from certain requirements under ERISA and other years they would not. More importantly, employees' rights would be jeopardized as a result of not knowing whether the plans fit the top hat exemption, and whether their funds would be subject to forfeiture.

Further, the First Circuit's measurement of "select group" as only those employees who actually contribute to the plans is disconnected from the underlying rationale for the top hat exemption that employees can protect themselves. This is because, under this measure, the "select group" constantly changes and every year presents a clean slate to the employer concerning who will receive contributions to the plans (in this case, based on NPI). As a result, the same employee, or doctor, may be included in the "select group" in one year and out the next. Such unpredictability and lack of continuity cuts against the rationale of the top hat exemption that the individuals who comprise the "select group" are capable of protecting their own interests and have the ability to bargain with their employer. Looking to whom the

plan is offered at a particular point in time, (*e.g.* at the beginning of the calendar year) to define the "select group" -- as the Second and Sixth Circuits have done -- places an employee in a better position to bargain with her employer and therefore, is more consistent with the purpose of the top hat exemption.

A. The Statutory Definition of "Participant" Should Apply in the "Select Group" Analysis

The Second Circuit in *Demery* implicitly adopted the reasoning of the *Darden* court, which held that employees who "may become eligible to receive a benefit" in accordance with the statutory definition of "participant" must be counted in the "select group" analysis. *See Demery*, 216 F.2d at 288, *citing Darden*, 717 F. Supp. at 396. The First Circuit rejected *Darden's* reasoning and limited the "select group" to those who actually received a benefit. *Alexander*, 513 F.3d at 45 & n. 8 (*App. 16a*).

In *Darden*, the dispute centered around which insurance agents should be counted as participants in the plan for purposes of determining whether they comprise a "select group." 717 F. Supp. at 396. The defendant, Nationwide, argued that only those agents who had completed five years of service should be counted as plan participants. *Id.* Rejecting Nationwide's position, the *Darden* court noted that ERISA's definition of "participant" which includes all employees who "may become eligible" is the more appropriate method of determining the select group. *Id.* The *Darden* court noted:

> [T]he distinction between vesting and eligibility requirements is irrelevant for determining who is a plan participant under ERISA, since included within the statutory definition of "participant" are employees who "may become eligible to receive a benefit." Thus, those employees who have not satisfied the eligibility requirements for the plan must still be counted as "plan participants" if they *may* satisfy those requirements. **In other words, the relevant question is not whether the employee *has* satisfied the eligibility requirements, but whether he is *eligible* to satisfy the eligibility requirements.**

Id. (emphasis in original and bold emphasis added). Accordingly, the *Darden* court held that those agents who had entered into the standard agent's agreement, even if they had not completed five years of service, must be counted for purposes of the "select group" analysis. *Id.* at 396-97.

Other courts have followed *Darden's* "select group" analysis. For example, in *Simpson v. Ernst & Young*, 879 F. Supp. 802, 816 (S.D.Ohio 1994), the court held that one need not be "presently eligible" for benefits to be a "participant" under ERISA:

> . . . an ERISA plan participant does not have to be presently eligible to receive plan benefits. The fact that Simpson had not yet attained the age or years of service requirements does not mean that he was not a participant. To hold otherwise would limit ERISA protection only to

> those who have already vested or have obtained nonforfeitable rights to pension benefits.

Id., citing 29 U.S.C. § 1002(7) (emphasis added)). The First Circuit refused to adopt this reasoning, stating:

> [Our] holding defeats the appellant's reliance on *Darden v. Nationwide Mut. Ins. Co.*, 717 F. Supp. 388 (E.D.N.C. 1989), *aff'd*, 922 F.2d 203 (4th Cir. 1991), *rev'd on other grounds*, 503 U.S. 318, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992). *Darden* rested squarely on an erroneous holding that the "participant" definition should be transplanted root and branch into the top-hat exemption. *See id.* at 396-97.

Alexander, 513 F.3d at 45 n.8 (*App. 16a*).

The First Circuit's conclusion that the BSG plans were limited to a "select group" contradicts the undisputed fact that all BSG surgeons "were *potentially* eligible to contribute to the plans..." *Alexander*, 513 F.3d at 40-41 (*App. 16a*) (emphasis added). If all surgeons had the *potential* to contribute to the plans, then all surgeons "may become eligible" to contribute to the plans, which is in accord with the statutory definition of "participant."[10]

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[10] The First Circuit's reliance on *Duncan v. Walker*, 533 U.S. 167, 173 (2001) is not dispositive of this issue. As the Court has recognized, the principle set forth in *Duncan* has its limitations. For example, in *Burns v. United States*, 501 U.S. 129 (1991), the Court acknowledged that although Fed. R. Crim. P. 32 was silent as to whether the district court needed to provide notice that it was going to make an upward departure from the federal

B. The First Circuit Failed to Credit the Plan Language

In addition, the term "Participant" as it appears in the FRBP is capitalized and, fairly read, indicates that the drafters intended the term to refer to ERISA's statutory definition of "participant" which includes employees who "may become eligible" for benefits. *See Progressive Cas. Ins. Co. v. Reaseguradora Nacional De Venezuela*, 991 F.2d 42, 47 (2d Cir. 1993) ("The use of capitalized letters in the phrase 'Subject to Facultative Reinsurance Agreement' indicates to any reasonable person that a specific document is being referenced.") (emphasis in original). *Cf. In re Winn-Dixie Stores, Inc.*, 356 B.R. 813, 815 n. 2 (M.D. Fla. 2006) (noting that any term not defined in the plan of reorganization or court's order shall have the meaning given to that term in the Bankruptcy Code or Rules). The First Circuit refused, however, to assign any meaning to the capitalized term, reasoning that "a scrivener's choice of plan language cannot be allowed to control the more general interpretive inquiry into what the statute requires." *Alexander*, 513 F.3d at 45 (*App. 16a*).

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sentencing guidelines, it would read such a requirement into the rule based on "the textual and contextual evidence of legislative intent" because in the absence of notice, the right to be heard has "little reality or worth." *Id.* at 136. *See also Field v. Mans*, 516 U.S. 59, 76 (1995) (refusing to interpret statute's silence as Congressional intent to exclude reasonableness requirement and noting that the pregnant rule of construction is not absolute and is at its "weakest when it suggests results strangely at odds with other textual pointers.").

Likewise, the First Circuit failed to address the eligibility language of the BSG plans in its analysis at all. Instead, the First Circuit simply acknowledged that the plans covered all surgeons without affording any weight to this critical fact. *Alexander*, 513 F.3d at 41 (*App. 6a*) ("At that time – and at all times material to this case – the plans covered all full-time BSG surgeons who held Harvard faculty appointments.") The First Circuit's ultimate conclusion - - that only surgeons who actually contribute to the plans comprise the "select group" - - is at odds with the plain language of the plans which cover all surgeons. Thus, the First Circuit decision also raises an important question concerning the effect of plan language in the top hat analysis.[11] *Compare Bakri*, 473 F.3d at 680 (plan language must be considered in "select group" analysis).

IV. The Detrimental Impact on Employees Under the Current Unsettled State of Top Hat Law

The First Circuit decision exposes countless employees to vast uncertainty regarding their status as participants in top hat plans. The First Circuit

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[11] Courts emphasize "the centrality of the plan documents" in analyzing an ERISA claim. *Forcier v. Metropolitan Life Ins. Co.*, 469 F.3d 178, 183-184 (1st Cir. 2006) (citations omitted). A primary purpose of ERISA is to ensure the integrity and primacy of the written plans and, therefore, the plain language of an ERISA plan must be given its literal and natural meaning. *Harris v. Harvard Pilgrim Health Care, Inc.*, 208 F.3d 274, 279 (1st Cir. 2000) (citation omitted). The First Circuit's decision contravenes these principles.

decision permits a retrospective, after-the-fact analysis to define the "select group" that is entirely inconsistent with the policy underlying top hat plans -- *i.e.* to limit participation to certain individuals who do not require all of ERISA's protections and have the power to negotiate with their employer about the terms of their deferred compensation plans. *See e.g. Gallione*, 70 F.3d at 727. If, under the First Circuit's test, it cannot be discerned who the "participants" are until after the earnings for a particular year, then how can it possibly be that the plans were "maintained" for a "select group?" Likewise, how could it be said that the "select group" possessed bargaining power to negotiate with their employer about the terms of the plans when the group is not defined until after the annual salaries are calculated? Participation must be gauged at the point at which the plan becomes relevant to one's employment, that is, when an employee would be able to affect its terms. Here, that point is when a physician is hired because it is impossible to know if in a particular year, he or she would receive a deferral. Identifying the participants of the "select group" after the fact and refusing to require bargaining power as an element of a valid top hat plan turns the top hat exemption on its head.

The better course has been set by the decisions of the Second and Sixth Circuits with respect to bargaining power and the employees who should be included in the "select group" analysis. This Court should resolve these issues to prevent further discord among courts over the criteria to determine whether a top hat plan is valid.

In sum, employee pension rights are an important matter of federal law which call for a uniform body of law, not more or less favorable treatment of employees depending upon the jurisdiction in which they reside. (Indeed, had this case been decided by the Eastern District of Virginia, Dr. Alexander would have not been required to forfeit his retirement funds because the BSG plans would have been struck down for lack of bargaining power.) Accordingly, ERISA's primary purpose of protecting employee pension funds coupled with preemption principles warrant this Court's review to resolve the current conflicts among the circuits and settle these important questions of federal law.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant review of this matter.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 07-1443

[Filed January 23, 2008]

EBEN ALEXANDER III, M.D.,
Plaintiff, Appellant,

v.

BRIGHAM AND WOMEN'S PHYSICIANS ORGANIZATION, INC., ET AL.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Mark L. Wolf, U.S. District Judge]

Before

Boudin, Chief Judge,
Selya, Senior Circuit Judge,

and Gelpi,* District Judge.

Michael Paris, with whom Colleen C. Cook and Nystrom Beckman & Paris LLP were on brief, for appellant.

David C. Casey, with whom Littler Mendelson, PC was on brief, for appellees.

SELYA, Senior Circuit Judge. This appeal implicates the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461. It presents two issues of first impression concerning the scope of ERISA's exemption for so-called top-hat deferred compensation plans. See id. § 1051(2). After careful consideration, we conclude — as did the district court — that the plans at issue are valid top-hat plans. In the course of our analysis, we reject the appellant's claims (i) that the plans cater to more than a select group of highly compensated employees and (ii) that the applicability of the top-hat exemption hinges on an implicit requirement that affected employees possess individual bargaining power.

I. BACKGROUND

We set forth here only those (essentially uncontroverted) facts that are necessary to place this appeal into perspective.[1] We refer readers who hunger

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* Of the District of Puerto Rico, sitting by designation.

[1] Even though the parties dispute certain facts, none of those disputes is relevant to our decision.

for more detail to the district court's exegetic opinion. See Alexander v. Brigham & Women's Physicians Org., 467 F. Supp. 2d 136, 137-41 (D. Mass. 2006).

In 1988, plaintiff-appellant Eben Alexander III began working for the Brigham Surgical Group Foundation (BSG), a hospital-based physicians' organization that employed a host of surgeons who, like the appellant, doubled in brass as Harvard Medical School (Harvard) faculty members. In January of 2001, BSG morphed into a new organizational structure known as Brigham & Women's Physicians Organization. As this corporate shuffle has no bearing on the claims before us, we refer throughout to BSG as the employer of record.

Due to their academic affiliation, the members of BSG's full-time surgical complement were subject to special Harvard-imposed salary caps. Over time, these caps began to chafe: BSG found that they hindered its ability to recruit and retain top-flight surgeons (who could earn substantially more in private practice). To remove this impediment yet still remain compliant with Harvard's wishes, BSG created two deferred compensation plans: the Faculty Retirement Benefit Plan (FRBP) and the Unfunded Deferred Compensation Plan (UDCP). By allocating portions of a surgeon's "excess" earnings to these unfunded accounts, BSG expected that it would make employment at the hospital more attractive to surgeons.

We pause at this juncture to sketch the architecture of the plans. The critical datum under each plan is a given surgeon's net practice income (NPI), that is, the

net of payments attributable to the services that he rendered less BSG's costs allocable to those services. In any year in which a surgeon does not have NPI equal to or greater than his base salary, he incurs an obligation to repay BSG for the deficit (either out of future NPI or out of pocket). In a rosier scenario — when and if a surgeon's NPI exceeds Harvard's earnings cap — the excess (up to 25% of the surgeon's salary) will be credited to his account in the FRBP.[2] If any surplus NPI remains (that is, if the excess of NPI over the salary cap is greater than the amount consigned to the FRBP), 50% of that surplus will be credited to the surgeon's account in the UDCP and the remainder will escheat to BSG. Should a surgeon produce a negative NPI in any year, the per annum deficit will be carried forward and debited against positive balances in his FRBP and UDCP accounts.

At the plans' inception, BSG lacked a clear indication as to the number of surgeons who might earn enough to produce contributions to the FRBP.[3] Over time, however, it became evident that only a small fraction of the surgical complement would achieve that distinction. The district court determined

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[2] The lower court's description of this aspect of the plan, see Alexander, 467 F. Supp. 2d at 139, albeit stipulated to by the parties, is an inexact paraphrase. Although the stipulation varies in some respects from the actual language of the FRBP, the discrepancies are not material to our decision.

[3] There is, however, some evidence that, from the beginning, BSG anticipated that no more than 10% of its aggregate workforce would contribute to the UDCP.

that the relevant years for purposes of this case were 1997, 1998, and 1999, see id. at 140, and the parties have acquiesced in that configuration. The figures for those years illustrate the "small fraction" trend. All surgeons were potentially eligible to contribute to the plans; the key was whether a given surgeon generated sufficient NPI. The surgeons en masse constituted 32.4%, 30.7%, and 27.2%, respectively, of BSG's aggregate workforce. However, the roster of surgeons who actually achieved the requisite income level(s) and thus contributed money into one or both of the plans was significantly smaller. In 1997, 8.7% of BSG's overall employee population contributed to the FRBP and 5.8% to the UDCP; in 1998, the figures were 6.2% and 3.3%, respectively; and in 1999, the figures were 4.9% and 3.1%, respectively.

A glance at the average income of the plan contributors conveys the magnitude of the pecuniary cleft between them and the employee population as a whole. During the three years in question, BSG employees as a whole averaged annual earnings of $83,403 (1997), $80,491 (1998), and $74,376 (1999). Meanwhile, the FRBP contributors earned on average $434,840 (1997), $476,024 (1998), and $418,059 (1999). The UDCP contributors were even more richly compensated; they earned on average $503,730 (1997), $581,320 (1998), and $483,073 (1999).

The record is pellucid that, upon recruiting the appellant, BSG introduced him to a compendium of fringe benefits. This introduction included a review of the documentation describing the FRBP and the UDCP and an explanation of the system of credits and

debits used in connection therewith.[4] At that time — and at all times material to this case — the plans covered all full-time BSG surgeons who held Harvard faculty appointments. As written, the plans afforded no option for any surgeon to opt out. And because they were already in place when the appellant joined BSG, he had no real opportunity to bargain over their terms.

That is not to say that the terms of the plans were set in cement. Of course, the appellant, as an individual employee, was unable to alter those terms. Like every other surgeon, however, he was a voting member of BSG. As such, standard corporate governance and decisionmaking mechanisms stood available to him. For example, BSG's board, which included surgeons as directors, could amend the plans, subject to the concurrence of the board's compensation committee (which, under BSG's bylaws, has "final authority respecting all compensation arrangements . . . between the Corporation and its . . . Employees"). While such corporate structures are not equivalent to direct employee democracy, they are nonetheless meaningful.

Here, moreover, the record indicates that the system responded to the surgeons and their wishes. As to plan amendments, the reviews are mixed: on one occasion, BSG's executive committee rejected a proposal to amend the plans, but on a different

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[4] We note that, during the course of his career with BSG, the appellant's performance resulted in both positive and negative NPI figures, leading to a series of credits and debits to his deferred compensation plan accounts.

occasion (in 1990) a proposal to revise the terms of the plans so as to make them available to Harvard faculty members of all ranks was adopted.[5]

With this backdrop in place, we turn to the genesis of the litigation. In 2001, BSG terminated the appellant's employment. Simultaneously, it notified him that he was running a cumulative NPI deficit and that, therefore, his FRBP and UDCP accounts would be debited by more than $400,000 to offset that deficit. The appellant protested, but to no avail.

After his ouster, the appellant sued BSG and related defendants in the United States District Court for the District of Massachusetts, asserting claims under both federal and state law. The district court deemed the state-law claims preempted, and those claims are not before us. We focus, then, on the appellant's federal claims.

In brief, those claims allege that BSG's sponsorship and administration of the FRBP and UDCP violated ERISA's vesting and fiduciary duty requirements. The appellant seeks money damages and ancillary relief (including attorneys' fees). BSG — we use this acronym throughout this opinion as a shorthand for all named defendants — replies that the plans, although within the realm of ERISA, were top-hat plans and thus exempt from the enumerated requirements.

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[5] The appellant suggests that the infrequency of amendment is emblematic of a lack of bargaining power. That is sheer speculation; that circumstance may well have been due to widespread satisfaction with the plans as they stood.

After prolonged discovery and the denial of cross-motions for summary judgment, the district court conducted a bench trial. It found that the plans were maintained primarily for the purpose of providing deferred compensation; that the surgeons as a group possessed sufficient bargaining power to alter the terms of the plans; and that the absence of individual bargaining power was irrelevant. See id. at 142, 145, 147. Having arrived at these findings, the court ruled that the plans came within the top-hat exemption and that, therefore, ERISA's vesting and fiduciary duty requirements were inapposite. See id. at 148. The court entered judgment accordingly, and this timely appeal ensued.

II. ANALYSIS

BSG crafted the two deferred compensation plans at issue here to take advantage of ERISA's top-hat provision, which applies to any "plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees." 29 U.S.C. § 1051(2). Not surprisingly, then, the questions before us revolve around the proper scope of that exemption.

In examining these questions, we begin by memorializing the applicable standard of review. We then orient our inquiry in terms of statutory purpose. Finally, we consider the appellant's dual assignments of error one by one and explain why we find them unconvincing.

A. Standard of Review.

It is common ground that deference is due to findings of fact made by a trial court following a bench trial. See Sierra Fria Corp. v. Donald J. Evans, P.C., 127 F.3d 175, 181 (1st Cir. 1997); Fed. R. Civ. P. 52(a). Here, however, the appellant does not challenge the district court's factual findings; rather, he trains his fire on certain of the court's legal conclusions. First, he calumnizes the court's determination as to which subpopulation of employees should be considered in deciding whether a deferred compensation plan meets the top-hat provision's "select group" requirement. Second, he argues that the district court erred as a matter of law in failing to recognize that the statute implicitly requires that every individual in the select group possess bargaining power sufficient to negotiate the terms of the plans. Because these asseverations demand that we ascertain what the statute requires as a general matter,[6] they engender de novo review. See Harvey v. Johanns, 494 F.3d 237, 240 (1st Cir. 2007); In re 229 Main St. Ltd. P'ship, 262 F.3d 1, 3 (1st Cir. 2001).

B. Statutory Purpose.

ERISA is a comprehensive statutory scheme enacted in response to escalating concerns about "the mismanagement of funds accumulated to finance employee benefits and the failure to pay employees

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[6] It is beyond cavil that the plans at issue here satisfy the other two statutory criteria: they are unfunded and maintained by BSG primarily to provide a deferred compensation benefit.

benefits from accumulated funds." Massachusetts v. Morash, 490 U.S. 107, 115 (1989); see Degnan v. Publicker Indus., Inc., 83 F.3d 27, 30 (1st Cir. 1996) ("ERISA is a remedial statute designed to fashion anodynes that protect the interests of plan participants and beneficiaries."). ERISA's substantive protections are designed largely "to safeguard the financial integrity of employee benefit funds, to permit employee monitoring of earmarked assets, and to ensure that employers' promises are kept." Belanger v. Wyman-Gordon Co., 71 F.3d 451, 454 (1st Cir. 1995).

The top-hat provision cuts a swath through this regulatory thicket, relieving employers of many of ERISA's more onerous burdens if — and only if — certain circumstances exist. To reach that safe harbor, a plan must be "unfunded" and "maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees." 29 U.S.C. § 1051(2). When those preconditions are satisfied, the plan is exempted from several of ERISA's stringencies, including rules governing plan participation, vesting, funding, and fiduciary duty. See Hampers v. W.R. Grace & Co., 202 F.3d 44, 46 n.3 (1st Cir. 2000); see also Cogan v. Phoenix Life Ins. Co., 310 F.3d 238, 242 (1st Cir. 2002). Reporting and disclosure requirements remain applicable. See 29 U.S.C. §§ 1021-1031; Hampers, 202 F.3d at 46 n.3.

The origins of the top-hat provision lie in Congress's insight that high-echelon employees, unlike their rank-and-file counterparts, are capable of protecting their own pension interests. See Gallione v. Flaherty, 70 F.3d 724, 727 (2d Cir. 1995); see also Dep't of Labor

Op. No. 90-14A (1990). Presuming that employees of this stature can fend for themselves, Congress relaxed some of ERISA's prophylactic obligations.

This congressional purpose is a reliable guidepost for the task of statutory interpretation. See Beckley Capital Ltd. P'ship v. DiGeronimo, 184 F.3d 52, 57 (1st Cir. 1999). Beyond that point, however, we possess few if any interpretive aids in discerning the precise scope of the top-hat provision. Thus, as a matter of both necessity and preferred practice, see, e.g., United States v. Meade, 175 F.3d 215, 219 (1st Cir. 1999), we turn to the statutory text. We add only that neither party has directed us to any useful legislative history.

C. Select Group.

As said, the top-hat provision applies only if, among other things, a plan is maintained for the primary benefit of "a select group of management or highly compensated employees." 29 U.S.C. § 1051(2). The first issue raised by the appellant concerns the methodology used in determining whether a given group is "select."[7] He argues that the statute envisions that the entire cohort of employees to whom a plan was offered — here, every full-time BSG surgeon who held a Harvard faculty appointment — comprises the relevant group. Taking this approach, he says that the

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[7] It is an open question whether the statutory phrase "select group" modifies only the term "management" or also modifies the term "highly compensated employees." For the purposes at hand, we assume arguendo, without deciding, that both categories of employees are subject to the "select group" requirement.

plans here at issue were maintained for roughly 30% of the workforce (hardly a "select" group).

The district court rejected this argument. It held that the relevant inquiry involved only those surgeons who in fact crossed the NPI threshold and contributed money to the plans. In so holding, the court concluded that "[a]s a practical matter" the plans were "maintained" for the surgeons who actually contributed and not for the more sizable group of surgeons who nominally were covered by the language of the plan documents. Alexander, 467 F. Supp. 2d at 144. Operating from this coign of vantage, the court found that the FRBP never was maintained for more than 8.7% of the relevant universe and that the UDCP never was maintained for more than 5.8% of the relevant universe. Id. So viewed, both groups were "select." Id.

The lower court's rationale fits readily within an unforced reading of the statutory text. After all, a substantial precondition — the accumulation of NPI in excess of the salary cap — must be satisfied before any surgeon can squirrel away money in either of the plans. That gets the grease from the goose: owing to the height of the threshold that contributors need to surmount, only a relatively small fraction of BSG surgeons contributed to either plan in the relevant years. Common sense suggests that it is this small fraction that should be taken into account in determining the composition of the select group for whom the plans were maintained.

We are fortified in this impression about the dimensions of the select group by the flanking

statutory phrases: "maintained" and "highly compensated." In view of Congress's linkage of these terms, it would seem very strange to say that the plans were being "maintained by an employer primarily for the purpose of providing deferred compensation" to employees who were not highly compensated, who did not cross the income-generating threshold needed to become plan contributors, and who might never be able to do so.

The more natural and sensible reading of the statute is that a plan is "maintained" for a group of employees only if those employees realistically have the capacity to benefit from it. Thus, for the purpose of determining whether a plan services a select group, we find relevant here only those employees who actually earned enough NPI to fund plan contributions. They are the employees for whom the money in the plans is being managed and held; they are thus the employees whom Congress had in mind when it devised the contours of the top-hat carve-out.

This conclusion is not at odds with the case law. The other courts that have spoken to this issue confronted categorically different situations — either situations in which employers or employees retained the discretion to contribute to the deferred compensation plans when and if they chose or situations in which every member of a designated group of employees received plan contributions albeit in differing amounts depending on some variable (say, the incidence of commissions). See, e.g., Demery v. Extebank Deferred Comp. Plan (B), 216 F.3d 283, 285 (2d Cir. 2000); Guiragoss v. Khoury, 444 F. Supp. 2d 649, 654 n.4 (E.D. Va. 2006); Carrabba v. Randalls

Food Mkts., Inc., 38 F. Supp. 2d 468, 471 (N.D. Tex. 1999). Thus, unlike this case, either every employee within the designated group received some benefit from the plan or someone possessed the ability to fund the plan as a matter of discretion (so that, crucially, the ability to fund the plans was always in existence).

The BSG plans are quite different: surgeons have no automatic entitlement to deferred compensation. Rather, any particular surgeon can contribute to the plans if — and only if — he or she generates sufficient NPI to surpass the salary cap. The surgeons who succeed in that endeavor can and do contribute; those who fail have no option to deposit money into the plans. Under these circumstances, it would be curious — and, ultimately, incorrect — to say that those plans were "maintained by an employer primarily for the purpose of providing deferred compensation" to the latter cadre of surgeons, that is, surgeons incapable of contributing to the plans.

The appellant has a fallback position. He argues, in the alternative, that ERISA's statutory definition of "participant" should define the relevant employee universe. Under that definition, "participants" include, inter alia, any employee "who is or may become eligible to receive a benefit of any type from an employee benefit plan." 29 U.S.C. § 1002(7). The appellant contends that, applying this definition, all the BSG surgeons should be included as part of the "select group" because each one of them signed the same plan documents and therefore might, if his or her earnings soared, "become eligible" to receive plan benefits.

This contention lacks force because the insertion of the term "participant" is made of whole cloth. The top-hat provision does not refer to the term "participant" at all, nor does any legislative history suggest that Congress intended to import that defined term into the top-hat provision. Indeed, the affirmative use of the term "participants" in a distinct provision of section 1051, see 29 U.S.C. § 1051(3)(A), strongly implies that the definition does not apply sub silentio throughout the statute. See Duncan v. Walker, 533 U.S. 167, 173 (2001) (explaining that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion") (citation and internal quotation marks omitted); United States v. Nason, 269 F.3d 10, 16-17 (1st Cir. 2001) (similar).

The appellant's argument boils down to the notion that, wherever ERISA mentions plans and employees, the drafters intended that reference should be made to the statutory definition of "participants." This notion is unfounded. The specific language used in section 1051(2)'s "participant" definition clearly encompasses employees who have not yet and may never become eligible for plan participation — yet the language of the top-hat exemption does not countenance the prospect of mere future eligibility. One does not "maintain[]" a plan for employees who are not yet eligible for it.

The fact that the plan documents for the FRBP refer to the surgeons as "[p]articipant(s)" does not undermine this conclusion. While a plan's specific

language can aid a court in determining whether that plan qualifies as a top-hat plan, see, e.g., Bakri v. Venture Mfg. Co., 473 F.3d 677, 678 (6th Cir. 2007), a scrivener's choice of plan language cannot be allowed to control the more general interpretive inquiry into what the statute requires.

For these reasons, we reject the appellant's importuning that we broaden the "select group" analysis by engrafting onto the top-hat provision the unrelated statutory definition of "participant."[8] While ERISA, as a broad remedial statute, should be liberally construed in favor of coverage, Kross v. W. Elec. Co., 701 F.2d 1238, 1242 (7th Cir. 1983), that principle does not permit us to override the clear text of the statute.

The itinerary for this leg of our voyage lists one more port of call. Once we have determined the relevant subpopulation of employees, it remains to be seen whether those employees constitute a "select group of . . . highly compensated employees." In this instance, the answer is obvious.

The status analysis turns on both qualitative and quantitative dimensions. See Senior Exec. Ben. Plan Participants v. New Valley Corp., 89 F.3d 143, 148 (3d

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[8] This holding defeats the appellant's reliance on Darden v. Nationwide Mut. Ins. Co., 717 F. Supp. 388 (E.D.N.C. 1989), aff'd, 922 F.2d 203 (4th Cir. 1991), rev'd on other grounds, 503 U.S. 318 (1992). Darden rested squarely on an erroneous holding that the "participant" definition should be transplanted root and branch into the top-hat exemption. See id. at 396-97.

Cir. 1996). As the highest-earning surgeons at BSG, the employees who contributed to the plans are qualitatively select; and because they comprise no more than 8.7% of BSG's workforce, the group is quantitatively select as well. See, e.g., Demery, 216 F.3d at 289 (describing 15.34% of the workforce as within "the acceptable size for a 'select group'").

The question of whether the relevant universe of employees is "highly compensated" is even more open-and-shut. To come within the compass of the top-hat provision, the employer must be able to show a substantial disparity between the compensation paid to members of the top-hat group and the compensation paid to all other workers. See Simpson v. Ernst & Young, 879 F. Supp. 802, 816 (S.D. Ohio 1994). Over the three years in question, the average income of contributors to the FRBP was roughly $440,000 — more than five times the average income of BSG employees as a whole. During the same time frame, the average income of the UDCP contributors was even greater (and, thus, the gulf was even wider). Although we acknowledge that in some cases it will be difficult to determine the exact boundaries of what constitutes "high" compensation within the purview of the top-hat provision, the case at hand is nowhere near the gray area; the contributors to BSG's plans were highly compensated in both relative and absolute terms. The appellant's first assignment of error therefore fails.

D. Bargaining Power.

We turn now to the appellant's second argument. The district court found that, when considered collectively, both the plan contributors and the general

population of teaching surgeons possessed appreciable power to influence the terms of their deferred compensation arrangements. Alexander, 467 F. Supp. 2d at 147. Relatedly, the court found that the appellant, as an individual, lacked that power. Id. at 140.

The appellant asserts that the court erred in concluding that his lack of individual bargaining power was irrelevant to the top-hat determination. In his view, every member of the select group for whose benefit a top-hat plan exists must possess bargaining power sufficient to influence the terms of the plan; elsewise, the plan cannot qualify for the exemption.

Once again, we look first to the text of the top-hat provision. In that proviso, Congress nowhere mentioned bargaining power. Indeed, the statutory language contains no indication that Congress contemplated that courts would consider employees' ability to bargain over the terms of their deferred compensation plans, either individually or collectively, when measuring the bona fides of a select group and determining the applicability of the top-hat provision.

What authority exists for the appellant's position derives from a Department of Labor (DOL) opinion letter purporting to shed light on Congress's reasons for enacting the top-hat provision. In pertinent part, that letter states:

> It is the view of the Department that in providing relief for "top-hat" plans from the broad remedial provisions of ERISA, Congress recognized that certain individuals, by virtue of

> their position or compensation level, have the ability to affect or substantially influence, through negotiation or otherwise, the design and operation of their deferred compensation plan, taking into consideration any risks attendant thereto, and, therefore, would not need the substantive rights and protections of Title I [of ERISA].

DOL Op. No. 90-14A.

The appellant leans heavily on the reasoning of this letter and chronicles a number of cases in which courts have cited the letter when discussing the individualized bargaining power of top-hat plan contributors. See, e.g., Duggan v. Hobbs, 99 F.3d 307, 312-13 (9th Cir. 1996); Guiragoss, 444 F. Supp. 2d at 658-59, 664; Carrabba, 38 F. Supp. 2d at 477-78; see also Prior v. Innovative Comm. Corp., 360 F. Supp. 2d 704, 713-14 (D. V.I. 2005) (relying on Duggan). Insofar as these cases adumbrate a hard-and-fast requirement that individual top-hat plan beneficiaries must have bargaining power, they all ultimately derive that requirement from the DOL opinion letter.

We decline the appellant's invitation to depart from the plain language of the statute and jerry-build onto it a requirement of individual bargaining power. The DOL opinion letter speaks only to Congress's rationale for enacting the top-hat provision. It does not present itself as an interpretation of the provision's requirements, nor does it make any mention of the need for or propriety of demanding that employers demonstrate their employees' ability to negotiate the terms of deferred compensation plans.

Agency opinion letters command deference only to the extent that they possess the power to persuade. See Kalda v. Sioux Valley Physician Partners, Inc., 481 F.3d 639, 647 (8th Cir. 2007); Johnson v. Watts Regulator Co., 63 F.3d 1129, 1134 n.2 (1st Cir. 1995). The DOL opinion letter here at issue falls within this taxonomy.

We have no quarrel with the letter's persuasiveness as a gloss on Congress's intentions in enacting the top-hat provision. But relying on that letter to justify a nascent requirement that every employee covered by a top-hat plan possess the power to negotiate the terms of that plan is simply too much of a stretch. To our way of thinking, such a reading is both unwarranted and unpersuasive. Even without the additional requirement of individual bargaining power, Congress's enactment strikes us as a reasonable effectuation of its purpose. In any event, in limiting the top-hat provision to a "select group of management or highly compensated employees," Congress ensured that employees' interests would be sufficiently protected.

If more were needed — and we doubt that it is — we are further counseled against the importation of a requirement of individual bargaining power by the bizarre consequences that would follow from it. Most important, that thesis implies that every top-hat plan can be rendered noncompliant by demonstrating that a single covered employee lacks individual bargaining power, no matter the overall characteristics of the "select group of management or highly compensated employees" to which he belongs.

Such an absolutist construction clashes with the essential nature of the top-hat provision, which has been interpreted more generally to mean that not every member of the select group need belong to the upper tier of management or fit within the highest stratum of compensation. See, e.g., Demery, 216 F.3d at 289; Guiragoss, 444 F. Supp. 2d at 663-64; Belka v. Rowe Furniture Corp., 571 F. Supp. 1249, 1252-53 (D. Md. 1983). These cases recognize the sensible proposition that it is the configuration of the group as a whole that controls.[9] If, as the appellant suggests, Congress was singularly concerned with an individual's ability to fend for himself or herself, we think it unlikely that Congress would have framed the statute in terms of "groups" at all.

We add a coda. As said, the district court determined that the surgeons, as a group, enjoyed bargaining power. See Alexander, 467 F. Supp. 2d at 147. Because neither party has either challenged that determination or questioned its necessity, we have assumed for argument's sake that collective bargaining power might conceivably be a prerequisite for a top-hat plan. We think it is wise, however, to note our grave doubts about the correctness of this assumption.

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[9]None of the cases cited by the appellant purports to hold that when an otherwise valid top-hat plan is offered to a "select group of management or highly compensated employees," that plan will lose its exempt status if any one of the covered employees lacks individual bargaining power. To the extent that any of those cases rely on an erroneous interpretation of the DOL opinion letter, we respectfully decline to follow that interpretation.

The two main reasons underpinning our holding that there is no requirement of individual bargaining power to qualify for the top-hat provision — (i) that neither the text nor the legislative history of the statute contains the slightest hint that Congress contemplated that courts would consider employees' ability to bargain over the terms of their deferred compensation plans and (ii) that the DOL opinion letter does not presume to interpret the statute — militate just as strongly against importing a requirement of collective bargaining power into the top-hat provision. Although Congress's rationale for fashioning the exemption was that the members of a "select group of management or highly compensated employees" could fend for themselves, the statute, by its terms, does not purport to require proof of power of any sort. In such circumstances, it would be highly unorthodox to convert a rationale (like the one set forth in the DOL opinion letter) into an independent statutory test.

III. CONCLUSION

For the reasons elucidated above, we uphold the judgment below. Consequently, the appellant's prayer for attorneys' fees under 29 U.S.C. § 1132(g) must be denied as moot.

Affirmed.

UNITED STATES COURT OF APPEAL
FOR THE FIRST CIRCUIT

EBEN ALEXANDER III, M.D.,
Plaintiff, Appellant,

v.

BRIGHAM AND WOMEN'S PHYSICIANS ORGANIZATION, INC., ET AL.,
Defendant, Appellees.

No. 07-1443

[Filed January 23, 2008]

JUDGMENT

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed, and the appellant's prayer for attorneys' fees under 29 U.S.C. § 1132(g) is denied as moot.

By the Court:

_____/s/_____
Richard Gushing Donovan, Clerk

[cc: Ms. Cook, Mr. Paris, Mr. Casey, & Mr. Keating.]

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

C.A. No. 04-10738-MLW

December 26, 2006.

Eben ALEXANDER, III, M.D.)
)
v.)
)
BRIGHAM AND WOMEN'S PHYSICIANS)
ORGANIZATION, INC., et al.)
)

MEMORANDUM AND ORDER

WOLF, District Judge.

I. SUMMARY

Plaintiff Eben Alexander, III is a neurosurgeon. He was a member of the defendant Brigham Surgical Group Foundation ("BSG") from 1988 until his employment was terminated in 2001 by BSG's

successor, defendant Brigham & Women's Physicians Organization, Inc. ("BWPO").[10]

BSG maintained two unfunded deferred compensation plans for its surgeons who were, like Alexander, also members of the Harvard Medical School Faculty. These were the Faculty Retirement Benefit Plan (the "FRBP") and the Unfunded Deferred Compensation Plan (the "UDC"). Alexander and other BSG surgeons who were affiliated with the Harvard Medical School were required to contribute to the FRBP and UDC if their "Net Practice Income" ("NPI") for a particular year exceeded the salary cap for Harvard Medical School faculty. The plans provided that the accounts of such surgeons in the FRBP and UDC would be reduced to offset any "practice deficit" the surgeon experienced in a subsequent year.

In some years Alexander generated NPI and, therefore, contributed to the FRBP and UDC. In other years he experienced a practice deficit. When Alexander was terminated by BSG he was informed that his accounts in the FRBP and UDC had been reduced to offset his accumulated practice deficit.

In 2004, Alexander filed this suit alleging that in reducing his FRBP and UDC accounts BSG, and other defendants involved with the FRBP and UDC, violated various state laws and the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et*

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[10] BWPO became the successor to BSG in January, 2001, shortly before Alexander was terminated. These defendants are referred to collectively as BSG in this Memorandum.

seq. Counts I-VIII, which alleged various state law claims, were dismissed. The parties then represented that a decision on Counts IX and X would, as a practical matter, resolve this case.

In Count IX Alexander alleges that the reduction of his FRBP and UDC accounts violates ERISA's vesting requirements and in Count X he alleges a related violation of ERISA's fiduciary responsibility provisions. In response, BSG asserts that the FRBP and UDC are "top hat" plans, as to which ERISA's vesting and fiduciary responsibility provisions do not apply.

The court denied the parties' cross-motions for summary judgment on the issue of whether the FRBP and UDC were top hat plans. A non-jury trial on this issue was conducted in October, 2006.

For the reasons described in detail in this Memorandum, BSG has proven that the FRBP and the UDC were each top hat plans. Therefore, the vesting and fiduciary responsibility provisions of ERISA do not apply to them. Thus, it was permissible for BSG to reduce Alexander's accounts in those plans to offset his practice deficit. Accordingly, BSG is entitled to judgment on Counts IX and X.

Based on the parties' representations, the court understands that the remaining counts, XI, XII, and XIII, will be voluntarily dismissed. The parties are being ordered to confer and inform the court, by January 12, 2006, whether those counts should be dismissed, which will render judgment complete and appealable.

II. FACTS

The following facts have either been agreed upon by the parties or proven by a preponderance of the credible evidence.

Alexander is a neurosurgeon. In 1988, he accepted an invitation to become a member of BSG.

BSG is a non-profit, tax-exempt organization established pursuant to 26 U.S.C. § 501(c)(3). Members of BSG were virtually all members of the faculty of the Harvard Medical School, another non-profit, tax-exempt § 501(c)(3) corporation.

BSG had several purposes. Its members had various academic ranks and taught surgery to students of the Harvard Medical School. They also constituted the Department of Surgery at the Brigham & Women's Hospital, where they conducted surgery and trained surgical residents.

In order to maintain its non-profit, tax exempt status, a § 501(c)(3) corporation must place reasonable limits on the income of those it compensates in order to assure that its earnings do not "inure to the benefit of private individuals." 26 C.F.R. § 1.501(c)(3)-1(c)(2). Therefore, the Harvard Medical School imposed an annual cap on the maximum compensation that could be received by a faculty member and BSG adhered to that cap.

However, the salary cap presented a challenge to BSG's efforts to recruit and retain excellent surgeons, who could earn far more than the maximum Harvard

Medical School salary if they worked elsewhere. This dilemma came into sharp focus when one of its most prominent surgeons, Dr. L.C.,[11] threatened to leave BSG for a more lucrative position.

Motivated by a desire both to adhere to the Harvard Medical School salary cap, and to provide the financial incentives necessary to recruit and retain excellent surgeons, BSG established two unfunded deferred compensation plans to which the most profitable surgeons each year would contribute-the FRBP and the UDC. Compensation was deferred to the UDC and/or FRBP only if a physician was employed by the BSG, a member of the full-time faculty of the Harvard Medical School, and generated an NPI in excess of the Harvard Medical School salary cap. If a physician generated an NPI that would raise his salary higher than this limit, BSG would reduce his salary by 25% and credit that amount to the FRBP. If any NPI remained, BSG would credit 50% of that remainder to the UDC. This was the only mechanism through which a physician could deposit money into a FRBP or UDC account. Money could not be withdrawn from these accounts until a member retired or died.

While motivated by the Harvard Medical School salary cap and the desire to recruit and retain excellent surgeons, the FRBP and the UDC were established and maintained primarily for the purpose of providing deferred compensation for a select group

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[11] To protect the financial privacy of the doctors referenced, whose full names have been submitted to the court under seal, the doctors are referred to in this Memorandum by their initials.

of BSG's most highly compensated members.[12] These plans supplemented rather than substituted for other qualified retirement plans for which all BSG employees were eligible.

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[12] The FRBP states that:

> The primary purpose of the Plan is to provide an opportunity to earn an incentive retirement contribution of 25% of a Participant's compensation (determined without regard to tax code limits on qualified plan contributions), offset for qualified plan and employer 403(b) contributions from any source.

Trial Exhibit 4, FRBP, § 1.01.

Similarly, the UDC provides that:

> If the total compensation of an Employee established by the Committee [on Compensation] exceeds the maximum permissible amount of compensation payable currently in cash or fringe benefits under the limitations imposed by Harvard Medical School, 50% of the excess (but not more than the maximum permissible amount of deferred compensation under said limitations) shall be credited by the Employer to a deferred compensation liability account payable to such Employee.

Trial Exhibit 3, UDC, § 2.01.

Therefore, the terms of the Plans indicate, expressly or implicitly, that their primary purpose was to provide deferred compensation. The testimony of Dr. John Mannick, the President of BSG when the plans were established, provided added, credible evidence that their primary purpose was to provide deferred compensation for the highest earning surgeons.

The FRBP and UDC were intended to be ERISA top hat plans, which would, among other things, be exempt from the vesting and fiduciary responsibility requirements of ERISA. The plans each gave BSG the right to reduce a member's FRBP and UDC accounts by the amount of his or her practice deficit for a particular year. A practice deficit occurred when the expenses attributed to a surgeon's practice exceeded the income that practice generated for the year.

Alexander received a description of the pertinent provisions of the FRBP and UDC when he joined BSG in 1988. Thus, he was put on notice that any deferred compensation that he earned would be reduced by any practice deficit he subsequently experienced. Alexander did not, however, have the opportunity or ability to decline to contribute to the FRBP or UDC if he earned enough to do so. Nor did he alone have the ability to negotiate modifications to either plan. Rather, if Alexander wanted to be a member of BSG and of the Harvard Medical School faculty, he had to accept the terms of those plans.

In certain years, Alexander generated NPI, which resulted in amounts being credited to his accounts in the FRBP and UDC. In other years, Alexander experienced a practice deficit.

On April 13, 2001, Alexander was notified by BSG that his employment was terminated. On April 23, 2001, his FRBP account was reduced by $190,000.00 and his UDC account was reduced by $251,887.16 to offset his practice deficit.

As explained earlier, Alexander now asserts that neither the FRBP nor the UDC was a top hat plan exempt from ERISA's vesting and fiduciary responsibility provisions. Therefore, he contends that BSG was not entitled to reduce the amounts of deferred compensation attributed to him for certain years because of his practice deficits in other years.

The relevant years for determining whether the FRBP and UDC constituted top hat plans are fiscal years 1997, 1998, and 1999.[13] All surgeons who were full-time faculty of the Harvard Medical School were eligible to contribute to the FRBP and the UDC. The number of such surgeons was 78 in 1997, 84 in 1998, and 88 in 1999. In those years, BSG had many other employees, totaling (including surgeons) 241 in 1997, 274 in 1998, and 324 in 1999.[14]

When the FRBP was established it was uncertain how many surgeons would earn enough in a particular year to contribute to it. When the UDC was established, it was anticipated that no more than 10% of BSG employees would earn enough each year to contribute to it.

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[13] All subsequent references to "years" are to fiscal years.

[14] It appears that the total number of employees each year included some surgeons who were not full-time Harvard Medical School faculty members and, therefore, were not eligible to contribute to the FRBP or UDC: 6 in 1997, 10 in 1998, and 12 in 1999.

In fact, in 1997, 21 BSG employees, constituting 8.7% of the total number of BSG employees, contributed to an FRBP account. These figures were 17 and 6.2% for 1998, and 16 and 4.9% for 1999.

Similarly, in 1997, 14 BSG employees, constituting 5.8% of the total number of BSG employees, contributed to a UDC account. These figures were 9 and 3.3% for 1998, and 10 and 3.1% for 1999.

In each of the relevant years, the surgeons who could theoretically have earned enough to contribute to the UDC and/or FRBP were about 30% of BSG's total workforce. More specifically, they were 32.4% of the total work force in 1997, 30.7% in 1998, and 27.2% in 1999.

There were some non-surgeons who earned more each year than some surgeons. However, those who contributed to the FRBP or UDC were necessarily both surgeons and the most highly compensated employees of BSG. The average compensation of employees who contributed to the UDC plan during 1997, 1998, and 1999 was $503,730, $581,320, and $483,073 respectively. The average compensation of employees who contributed to the FRBP plan during the fiscal years 1997, 1998, and 1999 was $434,840, $476,024, and $418,059 respectively. The average compensation of all BSG employees for the fiscal years 1997, 1998, and 1999 was $83,403, $80,491, and $74,376 respectively.

Therefore, the surgeons who contributed to the UDC and/or FRBP in the relevant years were part of a select group, qualitatively and quantitatively. It was,

by definition, also a group of highly compensated individuals.

While surgeons could not individually decline to participate in the FRBP and UDC deferred compensation plans or negotiate their terms, the surgeons as a group both had and exercised the power to change them. Some of the high earning surgeons who deferred compensation into the FRBP and UDC plans in 1997, 1998, and 1999 were on BSG's Executive Committee and/or Board of Directors at various times. Drs. P.B., D.B., L.C., J.C., E.E., J.R., P.S. and D.S. were all contributors to the plans who served on the BSG's Executive Committee. Drs. E.E., L.C., and D.S. were contributors to the plans who served on the BSG Board of Directors during Alexander's employment at BSG. The Board of Directors could consider changes to the UDC and FRBP. If the Board of Directors approved a proposed change, the proposal would be referred to the Executive Committee. The Executive Committee could vote to approve any change, which would then be submitted to the Committee on Compensation for final approval.

Surgeons as a group exercised their power to change the plans. In about 1990, a BSG member suggested that surgeons of all academic ranks be eligible to participate in the UDC rather than only those who held the rank of Associate Professor and above. The Executive Committee voted to submit the proposed change to the Committee on Compensation, which approved it. In addition, the Executive Committee rejected a proposal that would have allowed neurosurgeons at the Children's Hospital and

Brigham and Women's Hospital to pool their deferred compensation and have it split by all the neurosurgeons at both institutions.

III. CONCLUSIONS OF LAW

"ERISA is landmark legislation that subjects a wide variety of employee benefit plans to complex and far-reaching rules designed to protect the integrity of those plans and the expectations of" those with an interest in them. *Barrowclough v. Kidder, Peabody & Co., Inc.*, 752 F.2d 923, 929 (3d Cir. 1985) overruled on other grounds by *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110 (3rd Cir. 1993). 29 U.S.C. § 1053 provides that generally contributions to an individual's pension plan "vest" at a particular time and thus become "unforfeitable." Therefore, a vested interest in a pension plan may not be reduced by an employer. As indicated earlier, Alexander asserts that his contributions to the FRBP and UDC vested before his termination and, therefore, BSG could not properly reduce his accounts in those plans to offset his practice deficit.

As the Second Circuit has explained:

> ERISA's coverage provisions, 29 U.S.C. §§ 1003, 1051, 1081, and 1101, state that ERISA shall apply to any employee benefit plan, other than listed exceptions. One of these exceptions, known as a top hat plan, is defined as: "plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated

> employees." 29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1).[15] Top hat plans are exempt from the participation and vesting provisions of ERISA, 29 U.S.C. §§ 1051-1061, its funding provisions, 29 U.S.C. §§ 1081-1086, and its fiduciary responsibility provisions, 29 U.S.C. §§ 1101-1114, though not from its reporting and disclosure provisions, 29 U.S.C. §§ 1021-1031, or its administration and enforcement provisions, 29 U.S.C. §§ 1131-1145.

Demery v. Extebank Deferred Comp. Plan (B), 216 F.3d 283, 286-87 (2d Cir. 2000).

In this case, BSG has the burden of proving that FRBP and UDC were each top hat plans. *See In re The IT Grp., Inc.,* 305 B.R. 402, 407 (Bankr.D.Del. 2004); *Carrabba v. Randalls Food Markets, Inc.,* 38 F.Supp.2d 468, 470 (N.D.Tex. 1999). *Virta v. DeSantis Enterprises, Inc.,* 1996 WL 663970, at *3 (N.D.N.Y. 1996). It has done so.

It is undisputed that both the FRBP and UDC were unfunded plans and provided for deferred compensation. However, among other things, Alexander contends that the plans (1) were not maintained primarily for the purpose of providing deferred compensation and (2) were not maintained for only a select group of highly compensated employees.

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[15] As §§ 1051(2), 1081(a)(3), and 1101(a)(1) all include the same language defining a top hat plan, the court will refer only to § 1051(2) in the following analysis.

More specifically, Alexander asserts that the FRBP and UDC were not top hat plans because they were created to provide incentives for excellent surgeons to join and remain with BSG while receiving annual salaries that did not exceed the Harvard Medical School cap, and did not jeopardize the § 501(c)(3) status of the Harvard Medical School or BSG. However, while these were indeed the motives for the establishment of the plans, the terms of the plans, the manner in which they required that money not be withdrawn until a surgeon died or retired, and the credible testimony of BSG's President demonstrate that their purpose and effect was to provide deferred compensation to the most profitable of BSG's surgeons.

The fact that a plan is "established as a means to retain valuable employees" does not disqualify it from top hat status it otherwise deserves. *Demery,* 216 F.3d at 287. This is equally true if a plan providing unfunded, deferred compensation also aids recruitment of desirable employees.

> Top hat plans are designed to provide certain employees with payments over and above the benefits provided by "qualified" employee benefit plans-i.e., plans that are eligible for favorable tax treatment, such as [the employer's] standard retirement plan. The Internal Revenue Code limits the value of benefits that may be paid under qualified plans, *see* 26 U.S.C. §§ 401(a)(17), 415-hence the need for top hat plans when employers wish to provide a higher level of deferred compensation to their employees.

Eastman Kodak v. STWB, Inc., 452 F.3d 215, 217 (2d Cir. 2006). A desire to recruit and retain excellent employees would be a common, rather than unusual, motive for establishing a top hat plan. For example, in *Prior v. Innovative Communications Corp.* the top hat plan "was designed to replace benefits [plaintiff] lost when he left his previous employer." 360 F.Supp.2d 704, 708 (D.V.I. 2005). The fact that the creation of a plan was motivated by a desire to recruit and retain excellent employees does not disqualify it from receiving the top hat status it otherwise merits.

Alternatively, § 1051(2) expressly requires only that a top hat plan be maintained "primarily" to provide deferred compensation. The term "primarily" makes it clear that "top hat plan can have multiple broad purposes." *Garratt v. Knowles*, 245 F.3d 941, 946 n. 4 (7th Cir. 2001); *see also In re Battram*, 214 B.R. 621, 625 (Bankr.C.D.Cal. 1997) ("a top hat plan need only be 'primarily' for the purpose of providing deferred compensation, not exclusively for that purpose."). Again, the terms of the plans, the way they operated, and the credible testimony of BSG's President persuade the court that the ultimate and primary purpose of both the FRBP and UDC was to provide deferred compensation to the highest earning BSG surgeons. The plans also served the related, subsidiary purposes of adhering to the Harvard Medical School salary cap and providing the incentives necessary to recruit and retain surgeons who could earn more than that limit elsewhere.

Alexander also argues that the FRBP was not maintained for a "select group" of "highly compensated" employees. "To determine whether the

participants of an employee benefit plan are 'a select group of management or highly compensated employees,' " the district court must "conduct a fact-specific inquiry, analyzing quantitative and qualitative factors in conjunction." *Demery*, 216 F.3d at 288 (citing *Duggan v. Hobbs*, 99 F.3d 307, 312 (9th Cir. 1996)). Quantitatively, "there is no existing authority that establishes when a plan is too large to be deemed 'select.' "*Id.* However, a top hat plan "must cover relatively few employees." In *re New Valley Corporation*, 89 F.3d 143, 148 (3d Cir. 1996). Qualitatively, "the plan must cover only high level employees." *Id.* Either highly-compensated or management-level employees are "high level." *In re The IT Group, Inc.*, 305 B.R. at 410.

As the Second Circuit has explained, about 15% "is probably at or near the upper limit of the acceptable size for a 'select group.' "*Demery*, 216 F.3d at 289. Alexander contends that the BSG surgeons who were eligible and, therefore, might contribute to the FRBP and UDC constituted about 30% of all BSG employees and, therefore, were not a select group.

However, in the circumstances of this case it is not appropriate to focus on all BSG surgeons to define the group. Generally in the reported cases participation in the unfunded plan at issue was optional and courts correctly focused on everyone who was invited to contribute to a purported top hat plan to determine whether they were a select group. *Id.* at 285;*Carrabba*, 38 F.Supp.2d at 473-74; *Guiragoss v. Khoury*, 444 F.Supp.2d 649, 653-54 (E.D.Va. 2006). For example, in *Demery:*

> The Plan was offered to assistant vice-presidents, managers, and other senior officers representing approximately 15% of the work force of Extebank. Approximately, 7-10% of Extebank employees actually participated in the Plan.

216 F.3d at 285. Similarly, in *Carrabba,* all salaried employees were "invited to participate in the plan," but the highest paid executives were "slow to become involved." 38 F.Supp.2d at 473-74. In *Guiragoss,* the plaintiff "was not given the option of joining the Plan when she was hired," but she was invited to do so the next year and chose to enroll. 444 F.Supp.2d at 653.

In contrast, in the instant case only the highest earning BSG surgeons were permitted to contribute to the FRBP and UDC, and they were required to do so to the extent that their NPI for a particular year exceeded the Harvard Medical School salary cap. When the UDC was established, it was expected that no more than 10% of all surgeons would contribute to an account in any year. During the relevant years, surgeons comprising no more than 8.7% of all BSG employees contributed to the FRBP in a single year and surgeons comprising no more than 5.8% of the total workforce contributed to the UDC in a single year. As a practical matter, the plans were "maintained" only for those highest earning surgeons. Therefore, it is appropriate to consider only them when deciding whether the plans were maintained primarily to provide deferred compensation for a select group.

As indicated earlier, about 15% has been properly deemed to be the upper limit of a "select group."

Demery, 216 F.3d at 289. 8.7% and 5.8% are well-below that upper limit. They are also not far above the percentages of groups that have been found to be select in other cases. See *Belka v. Rowe,* 571 F.Supp. 1249, 1252 (D.Md. 1983) (1.6-4.6%); *Duggan v. Hobbs,* 99 F.3d at 312 (4.3%); *In re Battram,* 214 B.R. at 625 (3.1%). Therefore, the FRBP and UDC were each maintained primarily for a "select group" within the meaning of § 1051(2).

The select group in this case was, by definition, highly compensated. Only the highest earning BSG surgeons could contribute to either or both plans in a particular year. As described earlier, the surgeons who contributed to the FRBP in 1997, 1998, and 1999 had average compensation that was always at least $418,059 and ranged up to an average of $476,024. The surgeons who contributed to the UDC in 1997, 1998, and 1999, had average annual compensation of at least $483,073, and ranged up to an average of $581,320. In contrast, the highest annual average compensation of all BSG employees in those years was $83,403, about a fifth of the average annual compensation of a contributor to the FRBP. Therefore, the contributors to the FRBP and UDC were highly compensated both in absolute terms and relative to the total BSG workforce. *Compare Demery,* 216 F.3d at 289 (average salary of top hat plan participants was more than double the average salary for all other employees).

The actual contributors to the FRBP and UDC were also a select group qualitatively. Although some employees of BSG who were not surgeons earned more

than some surgeons, only surgeons were eligible to contribute to the plans.

Moreover, as described earlier, several of the highest earning surgeons who were, therefore, contributors to the UDC and/or FRBP were also part of BSG's management, as members of its Board of Directors, its Executive Committee, or both. "Congress and the Department of Labor have determined that the management and highly compensated employees who participate in unfunded deferred compensation plans do not need the same level of protection" as other employees. *Barrowclough,* 752 F.2d at 934;*see also Guiragoss,* 444 F.Supp.2d at 661.

The Department of Labor has stated that:

> It is the view of the Department that in providing relief for 'top-hat' plans from the broad remedial provisions of ERISA, Congress *recognized that certain individuals,* by virtue of their position or compensation level, *have the ability to affect or substantially influence, through negotiation or otherwise, the design and operation of their deferred compensation plan,* taking into consideration any risks attendant thereto, and, therefore, would not need the substantive rights and protections of Title I [of ERISA, which includes its vesting provisions].

DOL Opin. Letter 90-14A (emphasis added). The Department of Labor has, therefore, opined that in enacting § 1051(2) Congress recognized that highly compensated employees generally have the power to protect their own interests. High compensation has, in

effect, been deemed to be a bright-line proxy for bargaining power which makes exemption from ERISA's vesting and fiduciary responsibility requirements, among others, appropriate.

Alexander contends that an individual must be shown to have had actual power to negotiate the terms of a plan for it to merit top hat status. This contention is supported by language in several decisions. In *Prior v. Innovative Communication Corp.*, 360 F.Supp.2d at 714, the court stated that "[a]n important factor in determining that an unfunded plan constitutes a 'top hat' plan is whether an executive has the power to negotiate the terms of an individualized pension benefit." *See also Carrabba*, 38 F.Supp.2d at 478 ("The evidence does not persuade the court that any significant number of the participants in the [deferred compensation plan] individually had bargaining power ..."); *Guiragoss*, 444 F.Supp.2d at 661 ("[a] third requirement [for a valid top hat plan], provided by DOL advisory opinions, is that the select group consist of individuals who are in the position to protect their own interests ... The assumption underlying the top hat exemption from ERISA is simply that top-level executives are in a favorable bargaining position to negotiate the terms of an agreement ..."); *Duggan*, 99 F.3d at 313.

In some of the foregoing cases, the lack of individual bargaining power was evidence that the employee was not part of a select group. For example, in *Guiragoss*, the plaintiff found not to be part of a select group was a sales clerk in a jewelry store and the only other contributor to the plan at issue was another sales clerk. *See*444 F.Supp.2d at 653-54. In

contrast, in *Duggan,* the plaintiff who was found to be in a top hat plan was the only employee covered and actually "exerted influence over the design and operation" of the plan. 99 F.3d at 312-13. Similarly, the top hat plan in *Prior* was established solely for the plaintiff as part of his employment agreement in order "to replace benefits [plaintiff] lost when he left his previous employer." 360 F.Supp.2d at 708. In *Duggan* and *Prior* it was, therefore, necessary to focus on the individual's bargaining power because he was the only member of the group at issue.

However to the extent, if any, that other courts have interpreted § 1051(2) to require a showing that an individual such as Alexander had actual, individual bargaining power sufficient to negotiate the terms of an unfunded deferred compensation plan, this court respectfully disagrees.

Section 1051(2) is a statutory provision. "'As in all statutory construction cases, [the court must] begin with the language of the statute.'" *Phillips v. Pembroke Real Estate, Inc.,* 459 F.3d 128, 139 (1st Cir. 2006) (quoting *Barnhart v. Sigmon Coal Co.,* 534 U.S. 438, 450, 122 S.Ct. 941, 151 L.Ed.2d 908 (2002)). Statutory language is accorded "its ordinary meaning by reference to the specific context in which that language is used, and the broader context of the statute as a whole. If the statutory language provides a clear answer, the inquiry ends." *United States v. Roberson,* 459 F.3d 39, 51 (1st Cir. 2006) (quotations and citations omitted). "[T]he congressional intendment conveyed by unclear statutory language may be discernible from its legislative history." *Rolland v.*

Romney, 318 F.3d 42, 48 (1st Cir. 2003) (quotations and citations omitted).

Section 1051(2) makes no reference to bargaining power. Rather, it clearly states that to merit top hat status a plan must: (1) be unfunded; (2) be maintained primarily for the purpose of providing deferred compensation; and (3) such deferred compensation must be for "a select group of management or highly compensated employees." The statute could easily have stated that each of those management or highly compensated employees must have the power to negotiate the terms of the plan if Congress had intended to make such power a requirement of a top hat plan. The statute does not do so.

Moreover, the statutory language is not ambiguous. In any event, the parties have not identified any legislative history that indicates that Congress intended that highly compensated employees must individually have substantial bargaining power for a plan to achieve top hat status.

Nor does the language of § 1051(2) manifest an intent to require that employers demonstrate that the select group of management or highly compensated employees have sufficient bargaining power to negotiate the terms of an unfunded plan for it to merit top hat status. Again, pursuant to the usual canons of statutory construction, this may be the end of the proper inquiry. *See Barnhart,* 534 U.S. at 450, 122 S.Ct. 941; *Phillips,* 459 F.3d at 139.

The court recognizes, however, that some decisions discuss whether it has been shown that the select

group collectively has such power. For example, in *Demery,* the Second Circuit wrote:

> Ability to negotiate is an important component of top hat plans; we have noted that top hat plans have been exempted from ERISA's substantive requirements "because Congress deemed top-level management, unlike most employees, to be capable of protecting their own pension expectations." *Gallione [v. Flaherty,* 70 F.3d 724, 727 (2d Cir. 1995)]. Congress approved of a lesser level of regulation for top hat plans "on the premise that the employer's top-level executives have sufficient influence within the institution to negotiate arrangements that protect against the diminution of their expected pensions." *Id.* at 728; *see also Kemmerer v. ICI Americas Inc.,* 70 F.3d 281, 286 (3d Cir. 1995) ("Top hat plans ... which benefit only highly compensated executives, and largely exist as devices to defer taxes, do not require such scrutiny and are exempted from much of ERISA's regulatory scheme.").
>
> Here, the record is silent as to plaintiffs' ability to negotiate the terms of the Plan, and there is no evidence that they attempted to do so.... We do not think plaintiffs have proffered either direct or circumstantial evidence suggesting an absence of bargaining power sufficient to raise a question of fact on this issue.

216 F.3d at 289-90. Therefore, although not essential to its decision, the Second Circuit has suggested that

the actual bargaining power of the group of highly compensated individuals is relevant.

This court, however, finds that § 1051(2) establishes a bright-line test that requires only proof of a select group of highly compensated or management employees, without an additional demonstration that the group actually had and exercised the power to negotiate the terms of the plan at issue. However, this finding is not material to the conclusion that the FRBP and UDC were top hat plans because there is ample evidence that the BSG surgeons, particularly those who were the highest earners, had the ability to modify the plans and used it.

As described earlier, the FRBP was established as a result of the threat that a very profitable surgeon would leave BSG for a more lucrative position. This indicates that successful surgeons have both options and bargaining power. More significantly, the highest earning surgeons were represented on BSG's Board of Directors and Executive Committee. BSG surgeons proposed that the UDC be revised to include those at the lower Harvard academic ranks and that proposal was adopted. Therefore, the defendants have demonstrated that BSG surgeons generally, and its highest earning surgeons particularly, as a group had the power to influence the terms and operation of the plans.

The conclusion that the FRBP and UDC were top hat plans is not altered by the fact that 29 U.S.C. § 1002(7) defines a "participant" as "any employee or former employee ... who is or may become eligible to

receive a benefit...." Alexander argues that virtually all BSG surgeons were eligible to participate in the FRBP and UDC and theoretically might have generated sufficient NPI to do so. Therefore, Alexander asserts that because such surgeons composed about 30% of BSG's workforce, they did not constitute a select group. In essence, Alexander asks this court to follow the district court in *Darden v. Nationwide Mut. Ins. Co.*, 717 F.Supp. 388, 396 (E.D.N.C. 1989)*rev'd on other grounds*,503 U.S. 318, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992), and apply the § 1002(7) definition of participant for the purpose of determining whether the FRBP and UDC were maintained only for a select group.

It is not, however, appropriate to do so. Once again, "'in all statutory construction cases, [the court must] begin with the language of the statute.'" *Phillips*, 459 F.3d at 139 (quoting *Barnhart*, 534 U.S. at 450, 122 S.Ct. 941). In defining a top hat plan, § 1051(2) does not use the term "participant." Nor has any legislative history been cited to suggest that Congress intended that the § 1002(7) definition of participant be applied for the purposes of § 1051(2) analysis.

Moreover, in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117-18, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989), the Supreme Court limited the statutory definition of "participant" to those with a "colorable claim" that they will be eligible for benefits in the future. While the surgeons on the Harvard Medical School faculty constituted about 30% of the BSG workforce in the relevant years, no more than 8.79% of BSG employees earned enough in any year to contribute to an FRBP account and no more than 5.8%

earned enough in any year to contribute to a UDC account. While there may have been some difference in the individuals who generated sufficient NPI in each of those three years, the court does not find that enough of them had a colorable claim to FRBP or UDC benefits to eliminate top hat status for the plans even if, contrary to the court's conclusion, the *§ 1002(7)* definition of "participant" must be utilized in the analysis.

In view of the foregoing, the defendants have proven that FRBP and UDC were each, during the relevant period, a top hat plan. This conclusion is consistent with the purposes of ERISA. As explained earlier, ERISA seeks in part to "protect the integrity of [] plans and the expectations" of those with an interest in them. *Barrowclough,* 752 F.2d at 929. Alexander was given notice at the outset of his employment that if he generated NPI in a particular year a contribution would be made to the UDC and/or FRBP, and that his account in each of those plans would be reduced appropriately if he had a practice deficit in any subsequent year. This decision that the FRBP and UDC were top hat plans and, therefore, Alexander did not have a vested, irreducible interest in his accounts in the plans, gives integrity to the expectations that Alexander and BSG had at the outset of their association.

As top hat plans, the FRBP and UDC were exempt from the vesting provisions of ERISA, 29 U.S.C. §§ 1051-1061. *See Demery,* 216 F.3d at 286-87. As top hat plans, they were also exempt from the fiduciary responsibility provisions of ERISA, 29 U.S.C. §§ 1101-1114. *Id.; In re New Valley Corporation,* 89

F.3d at 149. Therefore, BSG is entitled to judgment on Counts IX and X of the complaint.

IV. ORDER

In view of the foregoing, it is hereby ORDERED that:

1. Judgment shall enter for defendants on Counts IX and X.

2. Counsel shall confer and, by January 12, 2007, inform the court whether Counts XI, XII, and XIII may be dismissed.

/S/ Mark L. Wolf
United States District Judge

APPENDIX C

Mr. Arnold J. Zurcher, Jr.
Cadwalader, Wickersham & Taft
100 Maiden Lane
New York, NY 10038

May 8, 1990

ERISA Sections:
201(2)
301(a)(3)
401(a)(1)

Dear Mr. Zurcher:

This is in response to your request, on behalf of the CSX Corporation (CSX), for an advisory opinion concerning the application of Title I of the Employee Retirement Income Security Act (ERISA) to a nonqualified plan of deferred compensation which CSX proposes to adopt and maintain primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees.

Your letter contains the following representations relevant to your request. CSX proposes to adopt and maintain a deferred compensation plan (the Plan) for certain of its employees. The Plan would not be qualified under *section 401(a) of the Internal Revenue Code* (the Code). Employees of CSX eligible to

participate in the Plan would be limited to "a select group of management or highly compensated employees", within the meaning of sections 201(2), *301(a)(3),* and *401(a)(1)* of ERISA. In addition to requiring that CSX agree to pay certain amounts as deferred compensation, computed under the terms of the Plan, at times specified in the Plan, the Plan provisions would afford participants an election to instruct CSX to defer a stated percentage of their compensation and to pay such amounts in the future at the same time as CSX is obligated to pay other amounts deferred under the Plan. Only compensation earned after the Plan's effective date would be deferred.

You indicate that the employee-participants' elections would be required to be made prior to the beginning of the period of service (typically the calendar year) for which the compensation would otherwise be payable and, once made, would be irrevocable. CSX would be contractually liable to pay the amounts of compensation deferred under the terms of the Plan, including the elective deferrals. You represent that CSX's promise to pay such amounts would not be secured, and that employee-participants in the Plan would have no interest in the assets of CSX, other than as unsecured general creditors. All amounts payable pursuant to the terms of the Plan would be payable from the general assets of CSX, which would be subject to claims of CSX's general creditors, as well as the claims of participants.

With respect to the Plan, you have requested that the Department find that: (1) the Plan will not fail to be "unfunded" solely because the Plan permits

employee-participants to elect to have payment of a stated percentage of their compensation deferred under the Plan; and (2) *29 CFR 2510.3-102* does not apply to amounts of compensation subject to such deferral elections. We believe the following guidance is responsive to your request.

Sections 201(2), 301(a)(3), and 401(a)(1) provide an exclusion from the requirements of Parts 2, 3 and 4 of Title I (pertaining to participation, vesting, funding and fiduciary responsibilities, respectively) for "a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees" (commonly referred to as a "top-hat" plan). It is the view of the Department that in providing relief for "top-hat" plans from the broad remedial provisions of ERISA, Congress recognized that certain individuals, by virtue of their position or compensation level, have the ability to affect or substantially influence, through negotiation or otherwise, the design and operation of their deferred compensation plan, taking into consideration any risks attendant thereto, and, therefore, would not need the substantive rights and protections of Title I.[16]

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[16] It is the Department's position that the term "primarily", as used in the phrase "primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees" in sections 201(2), 301(a)(3) and 401(a)(1), refers to the purpose of the plan (i.e., the benefits provided) and not the participant composition of the plan. Therefore, a plan which extends coverage beyond "a select group of management or highly compensated employees" would not constitute a "top hat" plan for purposes of Parts 2, 3 and 4 of Title

*2 In addition to limiting participation to a "select group of management of highly compensated employees", a "top-hat" plan, within the meaning of sections 201(2), *301(a)(3),* and *401(a)(1),* must also be "unfunded". The Department has expressed the view that any determination with respect to the "funded" or "unfunded" status of a plan of deferred compensation requires an examination of the surrounding facts and circumstances, including the status of the arrangement under relevant non-ERISA law.[17] In this regard, the Department, in addressing the issue as to whether "top-hat" plans (or excess benefit plans) would fail to be "unfunded" solely because certain "rabbi trusts" are maintained in connection therewith, the Department indicated that, in the absence of pertinent legislative history defining the term "unfunded" for purposes of Title I of ERISA, significant weight should be accorded under Title I to the positions adopted by the Internal Revenue Service (the Service)[18] Similarly, in the absence of an ERISA regulation defining a "top-hat" plan, it is the view of the Department that the positions adopted by the Service with respect to deferred compensation arrangements should be accorded weight in determining whether a "top-hat" plan is "unfunded" for purposes of Title I.

I of ERISA.

[17] See Letter from Elliot I. Daniel, Assistant Administrator for Regulations and Interpretations, Pension and Welfare Benefits Administration, to Richard H. Manfreda, Chief, Individual Income Tax Branch, Internal Revenue Service, dated December 13, 1985.

[18] *Id.*

29 CFR 2510.3-102 defines when certain monies which a participant pays to or has withheld by an employer, for contribution to an employee benefit plan constitute "plan assets" for purposes of Title I of ERISA and the related prohibited transaction provisions of the Internal Revenue Code (*53 Fed.Reg. 17628,* May 17, 1988). The regulation does not define the concept of what constitutes an "unfunded" plan for purposes of Title I of ERISA, which is relevant only with respect to two types of plans, "top-hat" plans (which by definition are "unfunded") and "unfunded" excess benefit plans.[19] Accordingly, it is the view of the Department that *29 CFR 2510.3-102* is not relevant to these types of plans and does not apply to amounts of compensation subject to deferral elections made pursuant to such plans. Similarly, it is the view of the Department that a plan which would otherwise be a bona fide "top-hat" plan or "unfunded" excess benefit plan would not fail to be "unfunded" solely because the plan permits employee-participants to elect to defer a certain percentage of their compensation.

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[19] Erisa section 3(36) defines an "excess benefit" plan as "a plan maintained by an employer solely for the purpose of providing benefits for certain employees in excess of the limitations on contributions and benefits imposed by *section 415 of the Internal Revenue Code* of 1954 on plans to which that section applies, without regard to whether the plan is funded. To the extent that a separable part of a plan (as determined by the Secretary of Labor) maintained by an employer is maintained for such purpose, that part shall be treated as a separate plan which is an excess benefit plan."

This letter constitutes an advisory opinion under ERISA Procedure 76-1.

Sincerely,

Robert J. Doyle
Director of Regulations and Interpretations

APPENDIX D

DEFERRED COMPENSATION PLAN

(An unfunded plan)

June 22, 1982

THE BRIGHAM SURGICAL GROUP FOUNDATION, INC.

Unfounded Deferred Compensation Plan

I - RECITALS

1.01 Employer. The "Employer" is the Brigham Surgical Group Foundation, Inc. a tax-exempt corporation organized under Massachusetts laws to carry out the purposes of Harvard Medical School relating to the education and training in the field of surgery of undergraduates enrolled in said school and to teach surgery to surgical residents, by conducting the Department of Surgery at the Brigham and Women's Hospital in Boston, Massachusetts. The performance of surgery is the Employer's primary medium of instruction and the primary source of support for its educational activities.

1.02 Employees. The "Employees" are surgeons who are members of the full-time faculty of the Harvard Medical School and are employed by the Employer to perform and teach surgery in the clinical setting of the

Brigham and Women's Hospital by collaborating with students and residents in the practice of surgery, in research, and in the development of theory. The Employees are paid by the Employer which (with few exceptions) is their only source of earned income and which is required to observe certain limitations imposed by the Harvard Medical School on the total compensation which may be earned by members of its full-time faculty.

1.03 Committee on Compensation. The By-Laws of the Employer give to the Committee on Compensation exclusive authority to determine the compensation of Employees. The Committee is controlled by outside Directors of the Employer, who represent the public interest. The Committee was established by agreement with the Internal Revenue Service in settlement of a United States Tax Court case relating to the exempt status of the Employer.

II - DEFERRAL OF COMPENSATION

2.01 Amount Credited. If the total compensation of an Employee established by the Committee exceeds the maximum permissible amount of compensation payable currently in cash or fringe benefits under the limitations imposed by Harvard Medical School, 50% of the excess (but not more than the maximum permissible amount of deferred compensation under said limitations) shall be credited by the Employer to a deferred compensation liability account payable to such Employee. The credit shall be recorded as of the last day of the employer's fiscal year or as of such other date or dates as the Committee may decide.

2.02 Funding of Deferred Payments. The right of an Employee to payment of his or her deferred compensation shall be an unsecured contractual right, even if the Employer on its own initiative or at the request of the employee purchases insurance or makes other investments as the source of future payment hereunder, and even if the insurance or other investments are earmarked with the Employee's name; that is, the Employee shall have no security interest in or similar claim to the asset.

2.03 Adjustments. If the Employee request the Employer to invest in one or more securities, mutual funds or insurance policies to hold as the source of future payment hereunder, and if the Employer (which shall have no obligation to do so complies, then the balance of the Employee's deferred compensation account shall reflect the amount of any net income, loss, change in value or administrative expenses directly attributable to the investment.

2.04 Forfeitability. An Employee's right to his or her deferred compensation shall be an unconditional obligation of this Employer except as follows:

(a) If the Employee attempts to assign or otherwise alienate his or her rights hereunder (except as otherwise provided herein) then he or she shall forfeit all deferred compensation previously accrued hereunder, the attempted assignment of [ailenation] shall be ineffectual, and no further rights shall accrue hereunder while the attempted assignment or alienation in effect.

(b) If the Employee is convicted of any crime against the Employer or is found by the Committee to be guilty of an act or omission gravely injurious to the reputation or other interests of the medical profession, the Employee, Harvard Medical School or Brigham and Women's Hospital the Committee may, to its discretion, declare forfeited any deferred compensation of such Employee previously accrued hereunder.

2.05 Set-Off, Section 2.04 above, notwithstanding, the Employer shall have the right to set off its liability to an Employee hereunder against any debt or other liability of the Employee to the Employer.

III - PAYMENT

3.01 Normal Form. The deferred compensation liability account payable to an Employee shall be charged with periodic payments beginning with the first 60 days after retirement, in such amounts and at such intervals as the Committee may direct for the purpose of reducing the balance of such account (subject to adjustments pursuant to Section 2.03 above, which shall continued) to zero with 20 years after retirement. Retirement is the termination of employment after attainment of age 66 or, if termination of employment occurs earlier, attainment of age 66.

3.02 Alternative Forms; Early Retirement. Alternative forms of retirement benefit (including a lump sum) and retirement before age 66 are available only on a negotiated basis.

3.03 Death Benefit. The death of the Employee shall not result in forfeiture. If death occurs before retirement the Employee shall be deemed to have retired on the date of death. If death occurs after retirement, any payments which have not yet been made shall be made when they would otherwise have been due. Payments after the death of an Employee shall be made to the beneficiary or beneficiaries designated and upon the conditions stated in a signed designation given by the Employee to the Plan Administrator or, if no other designation is in effect; to the Employee's widow or widower, if she or he or, if no other designation is in effect, to the Employee's widow or widower, if she or he is living at the payment date and, if not, by right of representation to the Employee's issue then living, if any, and if none is living, to those who would take the Employee's estate under the Massachusetts intestacy laws in effect and applied as if the Employee had died at the payment date.

IV - MISCELLANEOUS

4.01 Named Fiduciary; Plan Administrator. For purposes of any applicable laws regarding pension plans, the Committee on Compensation shall be the fiduciary generally responsible for the control and management of the Plan, and the Employer's Administrator shall be the Plan Administrator.

4.02 Claims and Review. All inquiries and claims respecting the Plan shall be in writing directed to the Plan Administrator. In the case of a claim respecting a benefit, a written determination allowing or denying the claim shall be furnished to the claimant promptly upon receipt of the claim. A denial or partial denial of

a claim shall be dated and signed by the Plan Administrator and shall clearly set forth the following information:

(a) the specific reason or reasons for the denial;

(b) specific reference to the pertinent Plan previous on which the denial is based;

(c) a description of any additional material or information necessary for the claimant to perfect the claim and an explanation of why such material or information is necessary;

(d) an explanation of the review procedures set forth below.

If no written determination is furnished to the claimant within thirty (30) days after receipt of the claim, then the claim shall be deemed denied and the thirtieth (30^{th}) day after such receipt shall be the determination date.

A claimant may obtain review of an adverse determination by filing a written notice of appeal with the Committee on Compensation within sixty (60) days after the determination date, or, if later, the receipt of a written notice denying the claim. Thereupon the Committee shall appoint one or more persons who shall conduct a full and fair review, which shall include the right:

(a) to be represented by a spokesman;

(b) to present a written statement of the facts and of the claimant's interpretation of any pertinent documents, statue or regulation; and

(c) to receive a prompt written decision clearly setting forth findings of fact and the specific reasons for the decision written in a manner calculated to be understood by the claimant and containing specific references to pertinent Plan provisions on which the decision is based.

A decision shall be rendered no more than sixty (60) days after the request for review, except that such period may be extended for an additional sixty (60) days if the person or persons reviewing the claim determine that special circumstances, including the advisability of a hearing, require such extension. The Committee may appoint itself, one of more of its number, or any other persons whether or not connected with the Employer to review a claim.

If benefits under the Plan are provided for in an insurance contract, group prepayment contract or other similar agreement and if the contract so provides, review of a claim shall be made by the insurance company or other contracting organization and the Plan Administrator shall so advise the claimant.

All applicable governmental regulation regarding claims and review shall be observed.

4.03 Governing Law. The document is governed by Massachusetts laws, except to the extent such laws

may be preempted by any applicable Federal laws governing pension plans.

4.04 Waivers, etc. This Plan can be amended only by a written document adopted by the Committee on Compensation. No waiver of any breach or non-observance of any condition shall be deemed to be an amendment or consent to future breach or non-observance by any party. The Plan shall not give any employee the right to continued employment. The Plan is in addition to and not in place of any other plan or arraignment, whether constituting part of a contract of employment or not, affecting the Employee.

THE BRIGHAM SURGICAL GROUP FOUNDATION, INC.

Unfunded Deferred Compensation Plan

Designation of Beneficiary

Section 3.03 of the above-titled Plan authorizes an Employee to designate a beneficiary or beneficiaries, stating the conditions under which they will benefit, with respect to death benefits. The designations is to be in a document signed by the Employee and given to the Plan Administrator (namely, the Administrator of the Brigham Surgical Group foundation, Inc.)

Accordingly, the undersigned Employee hereby designates* the following beneficiary or beneficiaries, upon the conditions stated:

Executed at Boston, Massachusetts as a sealed instrument this day of , 19 .

Employee: _____

Witness: _____

* Employees are encouraged to seek professional advice before designating their beneficiaries.

APPENDIX E

FACULTY RETIREMENT BENEFIT PLAN

(An unfunded deferred compensation plan)

Adopted July 1, 1989

(amended 7/29/91)

BRIGHAM SURGICAL GROUP FOUNDATION, Inc.

110 Cypress Street
Brookline, MA 02146

Brigham Surgical Group Foundation, Inc.

FACULTY RETIREMENT BENEFIT PLAN

1.01 SYNOPSIS. This document sets forth the Brigham Surgical Group Faculty Retirement Benefit Plan (the "Plan") established and maintained by the Brigham Surgical Group Foundation, Inc. (The "Employer"). The primary purpose of the Plan is to provide an opportunity to earn an incentive retirement contribution of 25% of a Participant's compensation (determined without regard to tax code limits on qualified plan contributions), offset for qualified plan and employer 403(b) contributions from any source. The Plan is also intended to provide supplementary contributions as may be required to ensure that a

Participant who receives compensation from other employers will, during the first three Plan Years in which the Participant is a participant in the Employer's qualified pension plan, receive a basic retirement contribution of 12.5% of compensation from such other employers (not to exceed the maximum contribution allowed under the tax code if all of the Participants' compensation were received from the Employer). Required State and Federal taxes shall be withheld from contributions, but any Participant tax on earnings or appreciation thereon shall be deferred. Benefits shall be paid from the general funds of the Employer. The Plan Administrator shall interpret and implement this Plan.

2.01 ELIGIBILITY. Participants hereunder shall all be employees of the Employer who are members of the full-time faculty of the Harvard Medical School; provided, that the Committee on Compensation of the Employer (the "Committee") may limit participation in order to fulfill the intent set forth in Section 5.02.

3.01 BENEFITS. Subject to the practice surplus requirements of the next following sentence, the Employer shall credit to each Participant an amount equal to 25% of the Participant's compensation for the Plan Year, reduced by the amount of any contribution for the Participant for such Plan Year to (I) any defined contribution plan qualified under Section 401(a) of the Internal Revenue Code of 1986 as amended (the "Code), and (ii) any arrangement under Section 403(b) of said Code. All such contributions shall be made only to the extent a Participant has a practice surplus a under the Employer's Professional Staff Compensation Policy, with the following

exception: in the case of a Participant who is a participant in the employer's qualified pension plan, the Employer shall (but only for the first [threo] Plan Years in which the Participant is a participant in such pension plan) make contributions of 12.5% of the Participant's Compensation (not in excess of the compensation limit of Section 401(a)(17) of the Code, which is $222,220 for the Plan Year beginning in 1991) reduced by the amount of any contribution for the Participant fo reach Plan Year under (i) and (ii) above, and further provided that the sum of the contributions for such Participant for such Plan Year under (i) and (ii) above shall not exceed the amount specified in Section 415 of the Code ($30,000 for Plan Years beginning in 1991) applied as if such contribution were made by a single employer. For the purposes of the forgoing reductions for contributions under (i) and (ii) above, employee salary reduction contributions shall not be counted, but employer contributions from the Employer and from other employers shall be counted. Compensation shall be such amounts, from all sources, as are counted as compensation under the Harvard System of Titles, Appointments and Compensation Arrangements as in effect from time to time.

3.02 ACCOUNTS. The Employer shall record credits made on behalf of each Participant in a retirement benefit account as a bookkeeping entry (the "Account") for such Participant. If the Participant requests the Employer to Invest in one or more securities, mutual funds, insurance policies, or such other investments as may be authorized by the Committee from time to time to hold as the source of future payment hereunder and if the Employer (which shall have no obligation to do so) compiles, then the balance of the Participant's

Account shall reflect the amount of any net income, loss, change in value or administrative expense attributable to the investment.

3.03 SET-OFF. The Employer may set-off prior to payment of benefits to a Participant hereunder any amounts due from the Participant to the Employer, including without limitation any current or prior practice deficits as determined under the Employer's Professional Staff Compensation Policy and amounts loaned to the Participant (whether or not such loan is secured by a mortgage).

3.04 FORFEITURE. Benefits under the Plan may be forfeited and all rights of the Participant and the Participant's beneficiaries shall be null and void, in the discretion of the Committee, if the Participant is convicted of any crime against the Employer or is found by the Committee to be guilty of any act or omission gravely injurious to the reputation or other interests of the medical profession, the Employer, Harvard Medical School or any of its affiliated teaching hospitals including the Brigham and Womens's Hospital.

3.05 NORMAL FORM OF DISTRIBUTION. The account payable to a Participant shall be charged with periodic payments beginning within the first 120 days after retirement, in amounts and at such intervals as the Plan Administrator may direct for the purpose of reducing the balance of such account (subject to adjustments pursuant to Section 3.03 above, which shall continue) to zero within 20 years after retirement. Retirement is the termination of employment with the Employer after attainment of

age 66 or, if termination of employment occurs earlier, attainment of age 66.

3.06 ALTERNATIVE FORMS: EARLY RETIREMENT. Alternative forms of retirement benefit (including a lump sum) and retirement before age 66 are available only at the discretion of Employer on a negotiate basis.

3.07 DEATH BENEFIT. The death of Participant shall not result in forfeiture. If death occurs before retirement, the Participant shall be deemed to have retired on the date of death. If death occurs after retirement, any payments which have not yet been made shall be made at least as frequently as the rate of payment in effect prior to death. Payments after the death of a Participant shall be made to the beneficiary or beneficiaries designated and upon conditions stated in a signed designation given by the Participant to the Plan Administrator or, if no other designation is in effect, to the Participant's widow or widower, if living at the payment date and, if not, by right of representation or the Participant's issue then living, if any, and, if none is then living, to those who would take the Participant's estate under Massachusetts intestacy laws in effect and applied as if the Participant had dies at the payment date.

4.01 SOURCE of BENEFITS. Benefits shall be paid from the general assets of the Employer and shall not be funded, by trust or otherwise. No Participant or beneficiary shall have a right greater than that of a general creditor of the Employer. Nothing herein shall be deemed to create a trust of any kind or to create any fiduciary relationship whatsoever.

4.02 ALIENATION of BENEFITS. Benefits are not subject to alienation, anticipation or assignment by a Participant or beneficiary and are not subject to be attached or reached and applied by an creditor of the Participant.

4.03 WITHHOLDING. The Employer shall withhold from the amount specified to Section 3.01 such amount of income, payroll and other taxes as required by law or deemed advisable by the Employer. The Employer shall withhold from payment of benefits such amount of income, payroll and other taxes as required by law or deemed advisable by the Employer. The Plan Administrator shall keep such records as necessary to establish the tax basis of benefits under the Plan.

5.01 PLAN ADMINISTRATOR. The Plan Administrator shall operate, interpret, and implement the Plan. The Plan Administrator shall be an individual appointed by the Committee or, if no individual is so appointed, the Committee shall be the Plan Administrator. The Plan Administrator's decisions and determinations (including determinations of the meaning and reference of terms used in this Plan) that are not arbitrary and capricious shall be conclusive upon all persons. The Plan Administrator shall be Named Fiduciary for purposes of the Employee Retirement Income Security Act of 1974 as amended ("ERISA").

5.02 INTENT. This Plan is intended to be unfunded and maintained by the Employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees within the meaning of Section 201(2) of

ERISA. Contributions are intended to be withheld therefrom before crediting hereunder), but any earnings or appreciation thereon are not intended to be taxable until payment to the Participant or Participant's beneficiary. This Plan shall be construed and interpreted in a manner consistent with the foregoing intentions.

5.03 GOVERNING LAW. This Plan shall be governed by the law of the Commonwealth of Massachusetts to the extent that it is not preempted by Federal Law.

5.04 EFFECTIVE DATE: PLAN YEAR. This document is a clarification and restatement of the Plan effective July 18, 1989. The Plan Year shall end on June 30 of each year.

5.05 AMENDMENT or TERMINATION. The Employer reserved the right to terminate or amend the Plan, in whole or in part, at any time, and thereby reduce or eliminate benefits for some of all Participants.

5.06 NO CONTRACT of EMPLOYMENT. This Plan shall not constitute an express or implied contract of employment between Employer and Participant.

6.01 CLAIMS and REVIEW. All inquiries and claims respecting the Plan shall be in writing and shall be directed to the Plan Administrator at such address as may be specified from time to time.

(a) CLAIMS. In the case of a claim respecting a benefit under the Plan, a written determination

allowing or denying the claim shall be furnished by the Plan Administrator to the claimant promptly upon receipt of the claim. A denial or partial denial of a claim shall be dated and signed by the Plan Administrator and shall clearly set forth: (1) the specific reason or reasons for the denial; (2) specific reference to pertinent Plan provisions on which the denial is based; (3) a description of any additional material or information necessary for the claimant to perfect the claim including an explanation of why such material or information is necessary; and (4) an explanation of the review procedure set for the below.

If no written determination is furnished to the claimant within thirty (30) days after receipt of claim, then the claim shall be deemed denied and the thirtieth (30^{th}) day after such receipt shall be the determination date.

(b) REVIEW. A claimant may obtain review of an adverse determination by filing a written notice of appeal with the Plan Administrator within sixty (60) days after the determination date or, if later, withing sixty (60) days after the receipt of a written notice denying the claim. Thereupon the Plan Administrator shall appoint one or more persons who shall conduct a full and fair review, which shall include the right: (1) to be represented by a spokesperson; (2) to present a written statement of facts and of claimant's interpretation of my pertinent document, statute or regulation; and (3) to receive a prompt written decision clearly setting forth findings of fact and the specific reasons for the decision written in a manner calculated to be understood by the claimant and containing specific references to pertinent Plan provisions on

which the decision is based. A decision shall be rendered no more than sixty (60) days after the request for review, except that such period may be extended for an additional sixty (60) days if the person or persons reviewing the claim determine that special circumstances, including the advisability of a hearing, require such extension. The Plan Administrator may appoint the Plan Administrator, or any other person or persons whether or not connected with the Employer to review a claim.

All applicable governmental regulations regarding claims and review shall be observed.

BRIGHAM SURGICAL GROUP FOUNDATION, Inc.

By:_____/s/_____
Dr. John A. Mannick, President

APPENDIX F

BSG PROPRIETARY

Brigham Surgical Group Foundation, Inc.

PROFESSIONAL STAFF COMPENSATION POLICY

15 September 1976

(Revised 5/16/96)

BSG PROPRIETARY

Preamble

This version of the Professional Staff Compensation Policy has been updated to reflect all changes in the handling of New Member Surpluses and Deficits approved by the Committee on Compensation to be effective November 4, 1994. Changes effective 1/01/96 and 4/01/96 respectively in the Recovery of Member Deficits and Bonus Payment Policy. Changes are effective 5/15/96 in the Post-Termination Bonus Policy.

Refer to the respective plan documents for the current provisions of the Brigham Surgical Group Foundation, Inc. Pension Plan (401(a) Defined Contribution Plan); the Faculty Educational Benefit Plan (FEBP), the Faculty Retirement Benefit Plan (FRBP) and the Unfunded Deferred Compensation (UDC) plan.

PROFESSIONAL STAFF COMPENSATION POLICY

OBJECTIVE: To provide a system of compensation that will enable the acquisition and retention of a professional staff of national and international stature and assure a balanced program of patient care, teaching and research.

All compensation paid directly or indirectly or Members of the Brigham Surgical Group Foundation, Inc. (the Group) will be in compliance with the provisions and limitations set forth in the Harvard System of Titles, Appointments and Compensation Arrangements for the Faculty of Medicine of Harvard University and shall be subject to the review, approval and/or ratification of the Group's Committee on Compensation as provided in the Bylaws of the Corporation.

Compensation arrangements shall be established with a view to adequacy, reasonableness and propriety in light of educational, scientific and other charitable objectives of the Corporation. In determining the compensation of any individual, activity resulting in the production of revenue shall be a relevant consideration, but not the sole or primary consideration. Other relevant considerations include pedagogical activity or scholarship and participation in the governance of the Corporation, hospital or medical school by committee work and similar activity.

Each Member will be eligible to receive two salary components, a component for OR-TEACHING activities and a component for NON-OR TEACHING

(NON-OR) activities. The OR-TEACHING salary component covers all activities that involve a billable service. The NON-OR component covers research, administration and teaching that does not involve a billable service. These two salary components are further defined in Appendix B.

1. Members shall have an OR-TEACHING salary based on their OR-TEACHING salary for the previous Academic Year (AY) plus 0-50% of any net practice surplus for such prior year but within ceiling. As determined by the Surgeon-In-Chief. The calculation of net practice surplus or deficit and Net Practice Income (NPI) for each Member will be determined as defined in Appendix A.

2. New Members of the Group will start at a salary level from all sources in be determined by agreement between the Division Chief or sponsor and the Surgeon-in-Chief. This starting salary plus a 401(a) qualified pension plan contribution thereon will be guaranteed for a period through the new members initial guarantee period and may be adjusted annually for increases in the cost-of-living as measured by the Consumer Price Index (CPI/U). Any new member at the rank of Instructor or Assistant Professor who generates NPI will have the amount of surplus first allocated to the Member's division up to the amount of any deficit previously incurred by the division. Additional surplus beyond prior divisional deficits and the offer salary will be divided equally between the new member and the Group. The 50% split will continue until the member is at ceiling. The new member would remain at the offer salary plus 50% of

surplus until the completion of their third full year of employment with the Group. New Members at the rank of Associate Professor or Professor who generate NPI in excess of their starting OR-TEACHING salary will receive an incentive bonus within Harvard ceiling and a 401(a) qualified pension plan contribution thereon within the available excess in the same manner as Members not in New Member status. The Group will absorb a new member deficit in Year 1 limited to salary, benefits, liability and an expense cap determined by the Surgeon-in-Chief. Any new members's expenses beyond the Groups's guarantee will be allocated such that the Group's portion of surplus from the Division is not reduced. Deficits in Years 2-3 will be absorbed by the new member or the new member's Division. New Member eligibility for the Faculty Educational Benefits Plan (FEBP), the Faculty Retirement Benefit Plan (FRBP) and the Unfunded Deferred Compensation (UDC) plan is specified in this respective plan documents.

3. OR-TEACHING salary levels will be re-established eac AY as soon as practicable after the end of the previous year and will be retroactive to July 1st. Once established, OR-TEACHING salaries will remain fixed for the full AY. Recovery of a current year member deficit will begin immediately after this quarter in which it occurs. The deficit will be offset by reducing salary by a maximum of 10% of OR-TEACHING or the total deficit over the remaining months in the year, whichever is less. Recovery of a Member's prior year(s) deficit will be monitored each quarter. If a ten percent (10%) reduction of the remaining deficit forward is not

reached in practice surplus each quarter, the deficit will be offset by reducing salary by a maximum of 10% of OR-TEACHING salary or the balance of the deficit, whichever is less, per quarter. In the case of both a current year and prior year deficits, only on 10% reduction in salary will apply, per quarter. The Surgeon-In-Chief has the authority to overrule this policy when deemed necessary.

OR-TEACHING salaries may be adjusted at mid-AY at the discretion of the Surgeon-in-Chief. The adjustment will be based on NPI for the current AY using the average Net Receipts for the past 12 months and estimated expenses through the end of the current AY . OR-TEACHING incentive salary bonuses from available NPI will be paid on the first payroll date following the quarter in which it occurs. The available NPI must be in excess of 10% of current base OR-TEACHING salary to qualify for a bonus payment. The bonus will be calculated at 50% of the available NPI less pension, applicable taxes and other payroll requirements. Bonus payments may only occur if there is no current or prior deficit and must comply with Harvard's Compensation Guidelines. The Surgeon-in-Chief has the authority to overrule this policy when deemed necessary.

4. When prior year NPI exceeds a Member's OR-TEACHING salary for that year, an OR-TEACHING incentive salary bonus, including a 401(a) qualified pension plan contribution thereon, will be paid from the excess NPI, the maximum bonus being that amount that will bring the Member's total salary from all sources up to full

Harvard ceiling for the Member's rank. The maximum 401(a) pension contribution being that amount that will bring the Members total 401(a) pension contribution up to the applicable IRS cap.

The details of the 401(a) pension plan are contained in the Brigham Surgical Group Foundation, Inc. Pension Plan documents.

5. The NPI that is excess after full Harvard ceiling for current cash compensation for a Member has been reached plus any pension plan contributions thereon (or such lesser amount as may result from any applicable IRS cap), will be credited to the Group's Faculty Retirement Benefit Plan (FRBP) for eligible Members up to the full Harvard ceiling for retirement plans of 25% of Total salary (including NON-OR TEACHING salary and any OR TEACHING incentive bonus amounts as in paragraph 4.) The Group may reduce, in whole or in part, the amount so credited to the FRBP for the Member in light of any special research grants awarded by the Employer with respect to such Member's research. However, any such reduction shall be disregarded for purpose of determining the excess under paragraph 6 below. ie: such reduction shall not be deemed to increase the amount credited to the member as an Unfunded Deferred Compensation allocation.

The details of the FRBP eligibility and benefits are contained in the Brigham Surgical Group Foundation, Inc. Faculty Retirement Benefit Plan documents.

5a. Where there remains excess NPI after the deductions described in paragraph 4, and 5, above, any unallocated 401(a) pension contributions or NON-OR TEACHING salary will be deducted from such remaining excess NPI.

6. When there remains excess NPI after the deductions described in paragraph 4., 5. and 5a. above, an amount equal to 50% of the excess will be credited to an eligible Member's account as and Unfunded Deferred Compensation (UDC) allocation. The amount credited to a UDC allocation for a given year shall not exceed 75% of full Harvard ceiling. To avoid financial hardship, UDC may be used to offset an OR-TEACHING salary deficit or to provide supplemental income in a year when usual compensation falls below Harvard ceiling but otherwise may not be received by a Member except by reason of death, disability, termination of employment or retirement.

UDC for Members employed by the Group prior to 8/16/86 will be credited on a before-tax basis and will accrue earnings and/or capital appreciation on a tax-deferred basis.

USC for member employed by the Group on or after 8/16/86 will be credited on and after-tax basis but will accrue earnings and/or capital appreciation on tax-deferred basis.

The details of the UDC plan eligibility and benefits are contained in the Brigham Surgical Group Foundation, Inc. Unfunded Deferred Compensation plan documents.

7. The amount of a Member's NON-OR TEACHING salary will be based on specific NON-OR TEACHING activities as defined in Appendix B. It is the responsibility of each Member of the Group to inform the Executive Administrator of the Group of any changes in NON-OR TEACHING activity will not ordinarily result in a retroactive NON-OR TEACHING salary adjustment. Failure to report the termination of a NON-OR TEACHING activity for which compensation is being received will usually result in a retroactive offsetting OR-TEACHING salary adjustment if their NPI so warrants. NON-OR Teaching salary is not included in the computation of NPI.

   NON-OR TEACHING salary will have 401(a) qualified pension contributions applied in the same manner as OR-TEACHING salary. 401(a) pension contributions or NON-OR TEACHING salary will not be allocated to a Member's account for computation of NPI but such pension contributions on NON-OR TEACHING salary will be subtracted from any surplus NPI prior to crediting UDC allocations.

8. Any excess NLP not paid or allocated to individual Group-Members under the foregoing policy shall accrue to the Brigham Surgical Group Foundation, Inc. Expenditure of these excess funds shall be based on the recommendations of the Surgeon-In-Chief with the approval of the Board of Directors.

9. The income from application of the Departmental Charge rate as provided in Appendix A for the determination of NPI will be used for Business Office expenses; undistributed expenses; new Member deficits incurred during their guarantee period; benefit plan legal and

auditing fees; interest expense; some limited Divisional expense funds and such other items of expense of a Departmental nature as may be approved by the Surgeon-in-Chief.

Expenditure of Departmental Charge funds shall be under the control of the Surgeon-in-Chief and the general review of the Executive Committee of the Board of Directors. The amount of this charge will be subject to re-establishment each year by the Executive Committee at the minimum level necessary to fund the indicated activities.

10. All Members who have completed four full years of employment with the Group and terminate service, including termination because of death, shall be eligible for non-termination incentive bonuses equal to 50% of their post-termination NPI less any prior years deficits, including any deficits incurred in the guarantee period with the Group, less any unauthorized research overruns not previously offset with pre-ceiling practice surplus or FRBP accruals. The deficits incurred during the guarantee period will be forgiven for members who have completed ten full years of employment with the Group.

A terminating member may allocate post-termination incentive bonuses against any second mortgage with the Group and may allocate post-termination incentive bonuses against any outstanding 401(a) pension loans subject to the following limitations:

a. Once post-termination bonuses are allocated to pension load payments, such allocations must continue until the pension loan is fully repaid.

b. When anticipated post-termination bonus payments have reached the point where they are projected to be less than the periodic payment on a pension load as projected by the Executive Administrator of the Group, any remaining pension loan balance must be settled in accordance with the terms of the load agreement, ie: the balance must be paid by the member or a taxable distribution will be make to the member for the amount of the remaining balance.

11. Members that have a substantial drop in their non-Group salary components during the academic year are eligible for the offsetting OR-TEACHING salary increase if their NPI so warrants.

12. Members who terminate service for any reason other than death prior to completing four years of service will receive severance pay equal to their 401(a) pension contribution minus any OR-TEACHING deficits incurred by the Member as computed under this compensation policy. The four year period and related compensation will be measured from July 1st of the Member's first 12 months of employment. Severance pay shall be paid to a terminating Member within two year's of the termination date.

13. Members at the rank of Associate Professor or Professor that completed 6 years of service become eligible for up to one year of sabbatical leave, subject to the prior approval of the Surgeon-In-Chief. The sabbatical cycle is 7 years, 6 years of service and one year of sabbatical leave. The purpose of sabbatical leave shall be health, rest, study or the prosecution of original work on science or medicine. No more than two Members may be on sabbatical leave at the same

time. While on sabbatical, one half of Memgber's Harvard academic ceiling salary will be paid by the Group for up to one year, or any equivalent combination, ie: full academic celiling salary for 6 months. For leaves of less than 6 months, the amount is reduced on a pro rata basis, ie: a 3 month leave would be entitled to 3/6ths of Harvard academic ceiling. etc. Amounts to be paid by the Group will be offset by any amounts received from other sources by the member during the sabbatical period. Additional salary may be allowed at the discretion of the Committee on Compensation if it is determined that a) work done in previous years has not been adequately compensated as measured by income received by the Group during the sabbatical leave resulting from the Members's prior OR-TEACHING activities or b) to the case of a faculty member with accrued USC, failure to receive additional pay would entail a financial hardship, in which case any additional pay allowed would be charged to the Member's UDC account.

APPENDIX A

Determination of New Practice Income (NPI)

The Net Practice Income (NPI) for each Member of the Group shall be determined annually based on the financial transactions occurring during the Academic Year (AY) (July 1-June 30). This determination will be made by finding the difference between the income resulting from Member OR-TEACHING activity and Member expenses during the AY. Member expenses include all direct and allocated expenses incurred by or on behalf of the Member involved plust a Departmental Charge equal to a percentage of New Receipts attributable to the Member's OR-TEACHING during the AY.

Direct and allocated OR-TEACHING expenses shall include all reasonable and allocable professional expenses for travel, professional memberships, books and subscriptions and professional liability insurance premiums; all office expenses including secretarial and paramedical salaries and their associated fringe benefits, office and medical supplies and other unusual medical office expenses; and all professional fringe benefits.

Professional fringe benefits will vary from time to time but generally will include FICA (Social Security), health insurance (Blue Cross/Blue Shield, Medicare B, Medex, HPHC, HUGHP, etc.) Taxable uninsured medical expense reimbursement payments, group term life insurance, accidental death and dismemberment insurance (AD&D), individual disability insurance (Non-Can), group long term disability insurance (LTD), and a pension/deferred income retirement benefit. The provisions of the pension/deferred income retirement plans are in separate plan documents.

The following 2 forms demonstrate the calculation of NPI:

by the group will be offset by any amount received from other sources by the member during the sabbatical period. Additional salary may be allowed at the discretion of the Committee on Compensation if it is determined that a) work done in previous years has not been adequately compensated as measured by income received by the Group during the sabbatical leave resulting from the Member's prior OR-TEACHING activities or b) in the case of a faculty member with accrued UDC, failure to receive additional pay would entail a financial hardship. In which case any additional pay allowed would be charged to the Member's UDC account.

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(2)

NO. 07-1347

FILED
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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

EBEN ALEXANDER III, M.D.,

Petitioner,

v.

BRIGHAM AND WOMEN'S PHYSICIANS ORGANIZATION, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Is "individual bargaining power," which is nowhere referenced in the statute, and which would render impracticable most plans covering multiple employees, an ERISA "top hat" requirement?

2. Is a group of highly compensated surgeons comprising less than nine percent of the workforce a "select group" under ERISA's "top hat" exception?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Brigham and Women's Physicians Organization, Inc. ("BWPO") and Boston Neurosurgical Foundation Inc. ("BNF") hereby disclose that BWPO's parent corporation is Brigham and Women's/Faulkner Hospitals, Inc. No publicly held company owns 10% or more of its stock. BNF does not have a parent corporation, nor does any publicly held company own 10% or more of its stock.

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Respondents respectfully request that the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit be denied.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. The Brigham Surgical Group Foundation

The Brigham Surgical Group Foundation ("BSG") was[1] a non-profit, tax-exempt organization established pursuant to Internal Revenue Code § 501(c)(3). *Alexander v. Brigham & Women's Physicians Org., Inc.*, 467 F. Supp. 2d 136, 138-39 (D. Mass. 2006). BSG's members constituted the Department of Surgery at Brigham and Women's Hospital and also served on the faculty of Harvard Medical School, teaching surgery to medical students. *Id.* at 139.

BSG members directly elected the organization's Board of Directors. *Alexander v. Brigham & Women's Physicians Org., Inc.*, 513 F.3d 37, 41 (1st Cir. 2008). Through its Executive and Compensation Committees, the Board, in turn, managed how BSG paid its members, and was responsible for BSG's deferred compensation arrangements. *Alexander*, 467 F. Supp. 2d at 141. Many BSG members served on the Board of Directors and

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1. Respondent Brigham and Women's Physician Organization, Inc. became the corporate successor to BSG in 2001. *Alexander*, 467 F. Supp. 2d at 138 n.1. Because both decisions below refer to these entities collectively as "BSG," Respondents will subscribe to this abbreviation.

the Executive Committee, and therefore had a direct voice in how they and their peers were compensated, including who was eligible to participate in the deferred compensation plans. *Id.*

B. BSG Compensation and the Unfunded Plans

Under I.R.C. section 501(c)(3), a non-profit entity must place reasonable limits on its employees' income so that the entity's earnings do not "inure to the benefit of private individuals." *Id.* at 139 (citing 26 C.F.R. § 1.501(c)(3)-1(c)(2)). Harvard Medical School therefore established a cap on BSG employee salaries. *Id.* This made recruiting and retaining world-class surgeons difficult for BSG. *Id.*

To offer competitive compensation while complying with the salary cap, BSG established two unfunded deferred compensation plans: the Faculty Retirement Benefit Plan ("FRBP") and the Unfunded Deferred Compensation Plan ("UDC," and, collectively, the "Plans"). *Id.* at 138. Eligible for the FRBP were those surgeons who were members of BSG, full-time faculty members of Harvard Medical School, and, most importantly, generated a net practice income ("NPI") greater than the BSG salary cap in the previous year.[2] *Id.* at 139. To be eligible for the UDC, a surgeon needed to be fully eligible for the FRBP and generate NPI more than twenty-five percent above the salary cap. *Alexander*, 513 F.3d at 40. No surgeon could choose to

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2. Net practice income is the net of payments for the surgeon's services rendered less BSG's costs allocable to those services. *Alexander*, 513 F.3d at 40.

contribute any money into a Plan if he was not fully eligible for it. *Id.* at 40-41. If a participant in a Plan generated NPI below his base salary in a given year, that amount would be deducted from the surgeon's accumulated deferred compensation account. *Id.*

BSG expressly intended that the Plans would satisfy ERISA's top hat criteria, and it projected that only a small number of surgeons—no more than ten percent—would ever meet all three requirements to be eligible for either plan. *Alexander*, 513 F.3d at 40-41; *Alexander*, 467 F. Supp. 2d at 140. This calculus proved accurate: at no time were more than twenty-one employees (8.7 percent of the BSG workforce) eligible for the FRBP, or more than fourteen (5.8 percent) eligible for the UDC.[3] *Alexander*, 467 F. Supp. 2d at 140-41.

C. BSG Members' Ability to Affect the Terms of the FRBP and UDC

BSG's members were able to, and did, alter the provisions of the Plans. *Alexander*, 513 F.3d at 41. In fact, the surgeons suggested at least two modifications to the Plans, one of which was adopted by the Board's Executive Committee in 1990. *Id.*

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3. For the FRBP, only 8.7 percent of BSG employees were eligible in 1997, 6.2 percent in 1998, and 4.9 percent in 1999. *Id.* at 140. For the UDC, only 5.8 percent were eligible in 1997, 3.3 percent in 1998, and 3.1 percent in 1999. *Id.*

D. Petitioner's Participation in the Plans

Petitioner was a highly compensated surgeon with BSG, and member of the Harvard Medical School Faculty, from 1988 until 2001. *Id.* at 40. During his tenure with BSG, Petitioner generated NPI surpluses in various years and therefore contributed to both the FRBP and the UDC. *Id.* at 41 n.4. However, because Petitioner incurred massive NPI deficits in the last few years before his departure, BSG debited his accounts the cumulative total of those shortfalls at his termination. *Id.* at 41; *Alexander*, 467 F. Supp. 2d at 140.

II. DECISIONS BELOW

A. The District Court's Rulings

Petitioner sued Respondents in the District Court for the District of Massachusetts in 2004, asserting various claims under state law and ERISA. *Alexander*, 467 F. Supp. 2d at 138. The court dismissed the state law claims as preempted, and conducted a bench trial in October 2006 on the rest. *Id.* At trial, Petitioner advanced three arguments: that the Plans were not "maintained primarily for the purpose of providing deferred compensation;" that the Plans were not maintained for a select group; and that the Plans did not qualify as top hat plans because Petitioner lacked "individual bargaining power" to affect their terms. *Id.* at 142.

In a comprehensive and well-reasoned decision, Chief Judge Wolf rejected each of Petitioner's arguments. The court first found that the Plans were

unfunded and maintained primarily for the purpose of providing deferred compensation under the applicable section of ERISA, 29 U.S.C. § 1051(2) (matters not raised by Petitioner on appeal and thus waived). *Id.* at 142. It next found that the Plans were maintained for a select group of highly compensated employees because only a small fraction of BSG employees (never more than 8.7 percent), who earned substantially more than their co-workers, ever contributed to either Plan. *Id.* at 144. Finally, the court held that, although BSG surgeons *had* the "ability to modify the plans and used it," "individual bargaining power" is not a top hat plan requirement. *Id.* at 145-47.

Finding that the FRBP and UDC were valid top hat plans, the District Court determined that the ERISA vesting and fiduciary responsibility requirements did not apply, and entered judgment for Respondents. *Id.* at 148.

B. The Court of Appeals' Decision

A panel of the Court of Appeals for the First Circuit unanimously affirmed the trial court's decision. It agreed that the small number of well-paid surgeons who actually contributed to the Plans were a select group of highly-compensated employees. *Alexander*, 513 F.3d at 44. The Court further found that individual bargaining power was not an element of the top hat test, both because the text of ERISA contains no such requirement, and because no legislative history points to such a requirement. *Id.* at 46-47.

REASONS FOR DENYING THE PETITION

I. THE COURTS BELOW DECIDED THIS CASE CORRECTLY

Certiorari should be denied because the District Court and the Court of Appeals correctly interpreted and applied ERISA. The FRBP and UDC were maintained for a select group of BSG employees only, and Petitioner's inability to negotiate over the Plan terms is of no consequence.

A. The Plans Were Only Maintained for a "Select Group"

The First Circuit properly found that BSG "maintained" the FRBP and UDC for a "select group" of highly profitable surgeons only. *Alexander*, 513 F.3d at 44. Because this holding is based on "[c]ommon sense" and "an unforced reading of the statutory text," no further review is necessary. *Id.*

As the First Circuit recognized, the contours of a "select group" are defined by the set of employees for whom the top hat plan is "maintained."[4] *Alexander*, 513 F.3d at 44; *see* 29 U.S.C. § 1051(2). Said differently, a select group is comprised of those employees who *realistically* can benefit from the plan, and for whom the money in the plans is *actually* being managed and held. *Alexander*, 513 F.3d at 44. Individuals who were

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4. The statutory verb on which the decision rests is "maintained;" Petitioner focuses on those to whom the Plans were "offered."

not intended to be a part of the plan, and for whom the plan is not administered, are therefore not part of the select group. *Id.* at 44-45.

Petitioner asserts that, because all BSG surgeons *hypothetically* could have generated sufficient profits to be eligible for the Plans, they constitute the proper analytical cohort for the select group analysis. *See* Petition for Writ of Certiorari ("Pet.") at 24. This argument ignores not only the plain language of the statute, but also the fact that the Plans had *three* requirements for eligibility: membership in BSG, a full-time faculty position with Harvard Medical School, *and* a sufficiently large NPI surplus. The contention that more than 8.7 percent of employees might conceivably have become eligible for the Plans if one or more of these requirements was disregarded is academic.

Petitioner's reliance on *Demery v. Extebank Deferred Compensation Plan (B)*, 216 F.3d 283 (2d Cir. 2000) also is misplaced. In *Demery*, the company offered approximately fifteen percent of its employees the opportunity to enter into a *voluntary* top hat plan. *Id.* at 285. The plan was maintained for this group of employees because all of them could have chosen to join at any time. *See id.* In contrast, BSG surgeons had *no* ability to voluntarily join either the FRBP or UDC. Once all three eligibility criteria were met, their contributions were automatic. Further, if an employee did not meet *all* Plan criteria, they could not contribute to either Plan. *See Alexander*, 513 F.3d at 44-45. BSG maintained the Plans for this smaller set of employees, not all surgeons

as Petitioner contends.[5] Since the Court of Appeals correctly decided the select group issue, no further review is warranted.

B. Individual Bargaining Power is Not Required By the Statute

The Court of Appeals also correctly decided that Petitioner's purported lack of individual "bargaining power" did not affect the Plans' top hat status. As the First Circuit noted, "neither the text nor the legislative history of [29 U.S.C. § 1051(2)] contains the slightest hint that Congress contemplated that courts would consider employees' ability to bargain over the terms of their deferred compensation plans." *Alexander*, 513 F.3d at 48. In its decision, the Court of Appeals simply hewed to the plain text of the statute.

Despite the striking absence of any such statutory requirement, Petitioner nonetheless asserts that "every member of the select group for whose benefit a top-hat plan exists must possess bargaining power sufficient to influence the terms of the plan; elsewise, the plan cannot qualify for the exemption." *Id.* at 46; *see* Pet. at 13-24. For this unfounded and unworkable[6] proposition,

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5. Petitioner's argument that the statutorily defined term "Participant" be imported into the top hat plan analysis (Pet. at 30) is also unfounded, since the word "participant" is not in the pertinent section of the statute, 29 U.S.C. § 1051(2). *See Alexander*, 513 F.3d at 45.

6. Under such a requirement, an employer with thousands or tens of thousands of employees would be hard-pressed to maintain a top hat plan for the dozens or hundreds of employees who might otherwise be eligible if the terms of the plan had to be negotiated by each employee.

Petitioner relies principally on a passing comment in one Department of Labor Opinion Letter, DOL Op. No. 90-14A. *See* Pet. at 14, 16. This argument is weightless for two reasons. First, the Opinion Letter does not purport to interpret the statute, but rather offers the Department's conjecture regarding certain Congressional considerations that led to the top hat exception.[7] DOL Op. No. 90-14A; *see Alexander*, 513 F.3d at 47. Second, the Opinion Letter did not address facts even remotely similar to those present in this case.[8] *See Alexander*, 513 F.3d 47-48.

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7. The pertinent section of the Opinion Letter reads:

> It is the view of the Department that in providing relief for "top-hat" plans from the broad remedial provisions of ERISA, Congress recognized that certain individuals, by virtue of their position or compensation level, have the ability to affect or substantially influence, through negotiation or otherwise, the design and operation of their deferred compensation plan, taking into consideration any risks attendant thereto, and, therefore, would not need the substantive rights and protections of Title I.

8. Even if bargaining power was somehow an element of the top hat analysis, the District Court found that Petitioner and his fellow BSG surgeons did possess the power to alter the terms of the Plans, and used it. *See Alexander*, 467 F. Supp. 2d at 146-47; *see also Alexander*, 513 F.3d at 48.

II. THE ISSUES PRESENTED ARE NOT SUFFICIENTLY IMPORTANT, AND NOT ADEQUATELY DEVELOPED, TO JUSTIFY REVIEW BY THIS COURT

Certiorari should also be denied because the questions presented do not warrant the Court's attention. They are narrow in scope and involve aspects of a minor exception to ERISA. Likewise, the Courts of Appeals have not given these rarely-litigated issues significant examination. Indeed, Petitioner identifies only *two* Circuit Court decisions as conflicting with the decision below. Because these issues are as undeveloped as they are insignificant, certiorari should be denied.

A. The Present Issues Are of Negligible Significance

Certiorari is unnecessary because the issues are not of sufficient importance to justify this Court's notice. The Court is not in the business of answering questions that do not go "beyond the academic or the episodic." *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955). Rather, it reserves its attention for issues of substantial consequence. *Cf.* Sup. Ct. R. 10(a).

The top hat plan is a barely-used exception within the vast ERISA framework. The Employee Benefits Security Administration oversees more than 700,000 ERISA retirement plans on an ongoing basis.[9] In

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9. *See* Employee Benefits Security Administration, Organization Chart, http://www.dol.gov/ebsa/aboutebsa/org_chart.html#section1 (last visited June 5, 2008).

contrast, since 1990, only 87,293 top hat plans have registered with the Department of Labor.[10] This averages to 4,850 top hat plans per year, or *.7 percent* of all ERISA retirement plans.[11] In this light, the issues here do not affect "countless employees." Pet. at 34.

Nor are the lower courts clamoring for direction on top hat plans; indeed, the subject is rarely litigated. While ERISA has generated a voluminous body of decisional law since its adoption in 1974, with thousands of cases interpreting it, only sixty reported decisions have addressed the top hat exception.[12] Furthermore, Petitioner seeks review of only one of the exception's three elements,[13] which further highlights the scant significance the Petition carries. Because review by the Court "would be of no importance save to the litigants

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10. Interview with Elaine Zimmerman, Ph.D, Employee Benefits Security Administration (May 15, 2008).

11. Unlike standard ERISA plans, which need to file a Form 5500 with the Department of Labor each year, a top hat plan only needs to file its disclosure once, and need not inform the Department if the plan terminates or merges. 29 C.F.R. § 2520.104-23(a). Thus, the number of actual top hat plans in existence is actually less than 87,293.

12. A search on Westlaw.com of all federal decisions under the "'Top Hat' Plans" headnote, run on June 5, 2008 yielded 60 results.

13. The District Court identified three elements: a top hat plan must "(1) be unfunded; (2) be maintained primarily for the purpose of providing deferred compensation; and (3) such deferred compensation must be for a 'select group of management or highly compensated employees.' " *Alexander*, 467 F. Supp. 2d at 146 (citing 29 U.S.C. § 1051(2)).

themselves," *Rudolph v. United States*, 370 U.S. 269, 270 (1962), certiorari should be denied.

B. There Are An Insufficient Number of Decisions on the Issues

As Justice Brennan recognized, "there is already in place, and has been ever since [he] joined the Court, a policy of letting tolerable conflicts go unaddressed until more than two courts of appeals have considered a question." Justice William Brennan, *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230, 233 (1983). Yet only *one* other Court of Appeal has passed on each of the limited subjects presented here: the Sixth Circuit addressed the "bargaining power" issue, *Bakri v. Venture Manufacturing Co.*, 473 F.3d 677 (6th Cir. 2007), and the Second Circuit touched upon the "select group" question.[14] *Demery*, 216 F.3d 283; *see* Pet. at 13, 24. Because any conflict that arguably exists between the Circuits in analyzing the criteria for ERISA's "top hat" exception is underdeveloped at best, and far from intolerable, certiorari is inappropriate at this time. *See Lackey v. Texas*, 514 U.S. 1045 (1995) (approving of the Circuits' role "as laboratories in which [an] issue receives further study before it is addressed by this Court"); *California v. Carney*, 471 U.S. 386, 400 n.11 (1985) ("the Court should not be compelled to intervene

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14. Petitioner argues that the "select group" holding below conflicts with the Sixth Circuit's *Bakri* decision. *See* Pet. at 24. However, *Bakri* only fleetingly refers to this issue in dicta. 473 F.3d at 678. No real conflict is presented where the difference is with another court's obiter dicta. *See Bunting v. Mellen*, 541 U.S. 1019, 1023 (2004) (Scalia, J. dissenting) ("We sit, after all, not to correct errors in dicta").

to eradicate disuniformity when further percolation or experimentation is desirable") (quoting Estreicher & Sexton, *A Managerial Theory of the Supreme Court's Responsibilities*, 59 N.Y.U. L. REV. 677, 716 (1984)).

III. THE UNUSUAL FACTS OF THIS CASE MAKE IT UNSUITABLE FOR REVIEW

This case's complicated and singular circumstances also render it improper for certiorari. Any holding would be confined to this case's facts, and would therefore be of scant applicability to other top hat plan administrators or beneficiaries. As Petitioner admits, the Plans here are "[u]nlike virtually every other 'unfunded' top hat plan." Pet. at 22. This is true in three material ways: the Plans' eligibility requirements, the intent behind the Plans' formation, and the surgeons' ability to influence their terms.

A. The Plans' Design and Eligibility Requirements

Out of necessity, the FRBP and UDC were designed to be different from other top hat plans. Because BSG is a non-profit organization, the Plans had to fulfill two seemingly contradictory requirements: increasing highly profitable physicians' compensation while keeping their salaries beneath the limit imposed by the medical school's non-profit status. Further, unlike most top hat plans, where a pool of eligible participants prospectively stake out their claim to a plan,[15] eligibility for the FRBP

15. *See, e.g.*, *Demery*, 216 F.3d at 285 (plan offered prospectively to assistant vice-presidents, managers, and other senior officers).

and UDC was determined *retrospectively*, based on the previous year's performance. This mechanism allowed BSG to reward the most profitable surgeons (and exclude lesser earners), without having to speculate regarding a surgeon's future productivity. The substantial sums of money deferred to the FRBP or UDC accounts in turn gave these profitable physicians a clear incentive to remain with the organization.

Although dramatically limited by the earn-in requirement, participation in the FRBP and UDC for those who did was mandatory. This plan design requirement found its source in the salary cap. A surgeon who generated NPI surplus could not simply take this money home, as that would impermissibly increase his salary above the Harvard-mandated limit. Rather, the surgeon's only option was to defer the money into these unfunded retirement Plans. Because employees in for-profit industries are not subject to such salary restrictions, the design of such plans tends to be far different and less contingent than those at issue here. *See Alexander*, 467 F. Supp. 2d at 143 ("Generally in the reported cases participation in the unfunded plan at issue was optional").

The unique facts of this case make it unsuitable for review by this Court. The "select group" analysis based on these singular circumstances would have little if any applicability to most other top hat plans, and would do little to advance this otherwise undeveloped area of the law.

B. BSG's Atypical Board of Directors

BSG's unique governance structure also makes this case a poor candidate for certiorari review. As a BSG member, surgeons (like Petitioner) directly chose the organization's Board of Directors; some surgeons even served on the Board and its constituent committees. *Alexander*, 513 F.3d at 41. Through the Board, surgeons were able to alter the policies of the organization. Indeed, BSG surgeons wielded this very power: in 1990, a physician-suggested proposal to revise the terms of the Plans was adopted by the Board. *Id.*

This governance structure bears little resemblance to the reality that most employees face. The typical employee cannot vote in the Board of his choice, but instead is subject to the decisions of Directors chosen by third party stockholders. Similarly, public corporations' Boards are not usually composed of the company's employees, or subject to the very policies they promulgate. Nor do most employees of large corporations have any real ability to petition corporate decision makers regarding any terms of their employment, let alone their benefits and compensation. Again, any bargaining power analysis performed here would have little relevance outside of this litigation.

Since the facts here are so unlike those that would be found in the vast majority of top hat plan cases, of which there are relatively few, certiorari would be of little value except to the parties. Consequently, further review is inappropriate.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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